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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1303

CHICAGO TRANSIT AUTHORITY,
A MUNICIPAL CORPORATION,
Petitioner,

vs.

BROCK ADAMS, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Chicago Transit Authority ("CTA"), respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is as yet unreported; it is reproduced herein as Appendix A. The opinion of the United States District Court for the Northern District of Illinois is unreported; it is reproduced herein as Appendix B. The Urban Mass Transportation Administration ("UMTA") decision *Bradford School Bus Transit, Inc.* v. *C. T. A.* (April 25, 1978) is reproduced herein as Appendix C. The UMTA decision *A & D Davenport* v. *C. T. A.* (May 5, 1977) is reproduced herein as Appendix D.

JURISDICTION.

The Court of Appeals entered its judgment on November 29, 1979. The Court of Appeals denied CTA's Petition for Rehearing on January 10, 1980. This Court has jurisdiction under 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

1. Is UMTA bound by its own regulations, plainly within the terms of the governing statute, to allow the use of federally-funded buses for student school-to-school supplementary busing during off-peak hours when the buses would otherwise be idle?

2. Are those UMTA regulations denying federally-funded buses the protection of the grandfather clause provisions of 49 U. S. C. §§ 1602(g) and 1602a(b) inconsistent with the statute and therefore void?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED.

Section 164(b) of the Federal-Aid Highway Act of 1973, 49 U. S. C. § 1602a(b), provides:

> No Federal financial assistance shall be provided . . . for the purchase of buses to any applicant for such assistance unless such applicant and the Secretary of Transportation shall have first entered into an agreement that such applicant will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators. . . . [T]his subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting school children and personnel along with facilities to be used therefor) was so engaged in school bus operations any time during the twelve-month period immediately prior to August 13, 1973. . . .

Section 3(g) of the Urban Mass Transportation Act of 1964, *as amended,* 49 U. S. C. § 1602(g), is similar:

> No Federal financial assistance shall be provided under this chapter for the construction or operation of facilities and equipment for use in providing public mass transportation service to any applicant for such assistance unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in school-bus operations, exclusively for the transportation of students and school personnel, in competition with private school-bus operators. . . . [T]his subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting schoolchildren and personnel along with facilities to be used therefor) was so engaged in schoolbus operations any time during the twelve-month period immediately prior to November 26, 1974. . . .

49 C. F. R., part 604, Charter Bus Operations, contains the following relevant regulations:

§ 604.3(b).

* * * * *

"Charter bus operations" means transportation by bus of a group of persons who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles or service, in accordance with the carrier's tariff, have acquired the exclusive use of a bus to travel together under an itinerary, either agreed on in advance, or modified after having left the place of origin. (This includes the incidental use of buses for the exclusive transportation of school students, personnel and equipment.)

* * * * *

"Incidental" means charter bus operations which do not interfere with regularly scheduled service to the public (as defined in the Opinion of the Comptroller General of the United States, B160204, December 7, 1966, which is attached as Appendix A of this part).

* * * * *

49 C. F. R., part 605, School Bus Operations, contains the following relevant regulations:

§ 605.3(b).

* * * * *

"Incidental" means the transportation of school students, personnel and equipment in charter bus operations during off peak hours which does not interfere with regularly scheduled service to the public (as defined in the Opinion of the Comptroller General of the United States, B160204, December 7, 1966, which is attached as Appendix A of this part).

* * * * *

"School bus operations" means transportation by bus exclusively for school students, personnel and equipment in Type I and Type II school vehicles as defined in Highway Safety Program Standard No. 17.

* * * * *

§ 605.12.

No grantee or operator of project equipment shall engage in school bus operations using buses, facilities or equipment funded under the Acts. A grantee or operator may, however, use such buses, facilities and equipment for the transportation of school students, personnel and equipment in incidental charter bus operations. Such use of project equipment is subject to Part 604 of Urban Mass Transportation Regulations.

STATEMENT OF THE CASE.

For over 25 years the CTA has provided school-to-school charter bus service to transport groups of students to less crowded schools or to schools offering special facilities or programs. More recently CTA school-to-school service has been an important part of the voluntary school desegregation plan of the Chicago Board of Education. In contrast to traditional "yellow bus" school bus service, this CTA charter bus service involves only school-to-school service and no pick-ups at specific points along a route.

A. Statutory and Regulatory Scheme.

In 1964 Congress first enacted legislation subsidizing public mass transportation. Public Law 88-365, as amended, 49 U. S. C. §§ 1601 *et seq*. "Mass transportation" is defined as:

> "[T]ransportation by bus, rail, or other conveyance, either publicly or privately owned, which provides for the public general or special service (but not including school buses or charter or sight-seeing service) on a regular and continuing basis." 49 U. S. C. § 1608(c)(5).

In 1966, an Opinion of the Comptroller General interpreted the limiting language in the definition. Opinion of the Comptroller General of the United States, B-160204 (Dec. 7, 1966). It held that federally financed equipment could be used for charter service or any lawful use so long as it was "incidental" and did not interfere with regularly scheduled service. The limiting language in the definition has not subsequently been amended.

In 1973 and 1974 Congress enacted express limitations on charter bus operations and school bus operations by grant recipients. 49 U. S. C. §§ 1602(g) and 1602a(b). The Urban

Mass Transportation Act now provides that a grantee may not "engage in schoolbus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators" subject to certain exceptions and a grandfather clause. 49 U. S. C. § 1602(g). Similar language is found in the Federal-Aid Highway Act of 1973. 49 U. S. C. § 1602a (b). It is undisputed that the CTA operated school-to-school service during all relevant grandfather periods.

In June 1974, the CTA entered into an agreement with UMTA in accordance with the Urban Mass Transportation Act whereby UMTA agreed to provide funds for CTA's purchase of transit equipment. The CTA continued to provide school-to-school services with buses which had finished rush hour runs. These buses, funded through UMTA, would have returned to the garage and been left idle if such services were not provided.

In 1976 UMTA issued regulations relating to charter bus and school bus operations by grant recipients. 49 C. F. R., parts 604 and 605. In three separate places the regulations expressly authorize the school-to-school bus services at issue in this case. The regulations specifically define "charter bus operations" so as to include the precise type of service at issue in this case: "This includes the incidental use of buses for the exclusive transportation of school students, personnel and equipment." 49 C. F. R. § 604.3(b). UMTA's School Bus Regulations expressly provide that "A grantee or operator may . . . use [federally-funded] buses, facilities and equipment for the transportation of school students, personnel and equipment in incidental charter bus operations." 49 C. F. R. § 605.12. See also 49 C. F. R. § 605.3 (b), "Incidental".

The regulations also provide that "[n]o grantee or operator of project equipment shall engage in school bus operations using buses, facilities or equipment funded under the Acts." 49 C. F. R. § 605.12.

B. Prior Administrative Proceedings.

On December 1, 1976, Bradford School Bus Transit, Inc. and three other private transit companies filed a Complaint with UMTA charging that the CTA violated federal law because of its school-to-school service. In an opinion entered May 5, 1977, UMTA found that the CTA's school-to-school service was "incidental" and held that such services were permissible charter bus operations. *A & D Davenport Transportation* v. *C. T. A.* (May 5, 1977), App. D, p. A43. None of the parties sought review of this decision.

In April 1977, Bradford filed a Complaint with UMTA challenging school-to-school bus service identical in character to that at issue in the first case. In a decision entered April 25, 1978, UMTA issued an Order flatly inconsistent with its prior decision. *Bradford School Bus Transit, Inc.* v. *C. T. A.* (Apr. 25, 1978), App. C, p. A33. UMTA did not consider whether the challenged school-to-school services were incidental, although it conceded that they were "identical in character" to the school-to-school services in *A & D Davenport* v. *C. T. A.*, App. C, p. A37. This time UMTA held that the school-to-school services constituted "school bus operations" rather than "charter bus operations". In addition, although UMTA found that the CTA qualified under the grandfather clauses, it held, without any statutory warrant, that the grandfather exemptions applied only to equipment purchased and maintained without UMTA assistance. UMTA ordered the CTA to cease performing school-to-school service commencing with the school year 1978-1979.

C. District Court Opinion.

Pursuant to the Administrative Procedure Review Act, 5 U. S. C. §§ 701 *et seq.*, and § 10(a) of the Act, the CTA filed a Complaint in the United States District Court for the Northern District of Illinois. The CTA thereafter filed a Motion for Preliminary Injunction supported by affidavit. The CTA requested

prompt judicial relief because it had been awarded a contract for school-to-school service during the school year 1978-1979 by the Chicago Board of Education, including services to implement the voluntary school desegregation program. UMTA filed a Cross-Motion for Summary Judgment.

The District Court held that UMTA had "disregarded" its own definition of "school bus operations," as well as its own definition of "charter bus operations." *C. T. A.* v. *Adams,* App. B, pp. A28-A30. The court held that under UMTA's own regulations, the school-to-school service in question constituted charter bus operations. The court set aside the decision of UMTA and remanded the case for further proceedings consistent with its opinion.

D. Court of Appeals Opinion.

On appeal by UMTA, the United States Court of Appeals for the Seventh Circuit reversed. *C. T. A.* v. *Adams,* App. A, p. A1. The court ignored the clear UMTA language and instead relied solely on Highway Safety Program Standard No. 17, 23 C. F. R. § 1204.4, which was incorporated by reference in one regulation. In the Standard the court found the definition of a school vehicle ("vehicle used to carry . . . pupils to and from school"), and, seizing upon an isolated phrase from the definition ("to and from school"), concluded that the services provided by the CTA were prohibited "school bus operations." App. A, p. A13. The court also reached the question of the regulations issued under the statutory grandfather clauses. The court held that the regulations were not inconsistent with the clauses in exempting only the transit agency but not the federally-funded buses it operates. App. A, p. A21.

The Chicago Transit Authority has filed this Petition for a Writ of Certiorari to review the decision of the Seventh Circuit.

REASONS FOR THE ALLOWANCE OF A WRIT.

The decision below will have widespread adverse effects on school districts and municipal transit agencies throughout the country. The practice of utilizing municipal transit buses during off-peak hours for incidental school transportation is a common necessity. With government budgets stretched everywhere, voluntary school desegregation plans and special education programs are jeopardized by the decision of the court below, and, if the decision is unchanged, many such programs will have to be abandoned. The decision thus encourages those who wish to frustrate rather than facilitate voluntary desegregation programs. Unless the decision is reviewed and reversed public transit authorities across the nation will lose hundreds of millions of dollars in revenues while school systems involved in desegregation busing programs will suffer increasingly higher costs.

The CTA services under attack here are not a threat to normal "yellow bus" school busing companies. Implementation of school desegregation plans throughout the nation, however, has created an artificial school busing industry which neither the statutes herein nor the regulations adopted thereunder were intended to protect. There is no indication in the statutes or legislative history that Congress intended federally-funded buses to lie idle at all times when not directly involved in public mass transportation in order to protect new entrants in the field created for the purpose of meeting the demand for desegregation busing.

In 1977 UMTA considered and approved CTA busing programs similar to that considered in this case, based upon its own regulations. In 1978 UMTA attempted to "reverse" itself based upon the same regulations. By its decision, UMTA has sanctioned a major change in the laws and regulations of the Department of Transportation without the benefits of the usual political process or due process required for such changes.

The original UMTA decision was clearly within the statutes and the regulations promulgated thereunder. The regulations were extant and plainly within the intent and purpose of the statutes. UMTA was bound by them. *United States* v. *Nixon*, 417 U. S. 683, 696 (1974).

The important questions of federal law which have been raised by this case should be settled by this Court. The financial situations of mass transit facilities throughout the country cannot wait for conflicting interpretations of the statutes and regulations in question to arise in other circuits.

A. UMTA IS BOUND BY ITS OWN REGULATIONS, TO ALLOW THE USE OF FEDERALLY-FUNDED BUSES FOR STUDENT SCHOOL-TO-SCHOOL SUPPLEMENTARY BUSING DURING OFF-PEAK HOURS WHEN THE BUSES WOULD OTHERWISE BE IDLE.

The UMTA regulations are complete in themselves in setting standards for school bus operations and charter bus operations. Precisely the services which are the subject of this litigation are authorized in the preamble of the regulations as "charter service":

> "By nature of their definitions, the terms 'school bus operations' and 'incidental use' are mutually exclusive as defined in these final regulations. Since school bus operations are usually undertaken in peak morning and evening hours, the incidental use of federally-assisted buses during those times is not possible. *The incidental use of federally-assisted buses to transport school students, personnel and equipment exclusively can only occur during non-peak hours and is therefore 'charter service' which is subject to part 604 of UMTA regulations.*" 49 C. F. R., part 605, preamble (Emphasis added).

Pursuant to the policy expressed in the preamble of part 605, the regulations prohibit grantees from engaging in non-incidental school bus operations using federally-funded buses. 49

C. F. R. § 605.12. The transportation of school students in incidental charter bus operations is expressly exempted from this prohibition, however.

> "No grantee or operator of project equipment shall engage in school bus operations using buses, facilities or equipment funded under the Acts. *A grantee or operator may, however, use such buses, facilities and equipment for the transportation of school students, personnel and equipment in incidental charter bus operations. Such use of project equipment is subject to Part 604 of Urban Mass Transportation Regulations.*" 49 C. F. R. § 605.12 (Emphasis added).

The incidental charter bus operations which are allowed by the regulations include "the transportation of school students, personnel and equipment in charter bus operations during off peak hours which does not interfere with regularly scheduled service to the public," pursuant to the definition of "incidental." 49 C. F. R. §605.3(b).

The regulation's definition of "charter bus operations" in part 604 is expressly designed, consistent with the above definitions and sections, to include such incidental operations:

> " 'Charter bus operations' means transportation by bus of a group of persons who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles or service, in accordance with the carrier's tariff, have acquired the exclusive use of a bus to travel together under an itinerary, either agreed on in advance, or modified after having left the place of origin. (*This includes the incidental use of buses for the exclusive transportation of school students, personnel and equipment.*)" 49 C. F. R. § 604.3(b) (Emphasis added).

UMTA has never disputed that the CTA school-to-school service meets each of the factual criteria of the definition of "charter bus operations."

The District Court based its decision on all of the pertinent regulations and held that the CTA service was permissible under the regulations. In contrast the Court of Appeals focused upon an isolated phrase in Highway Safety Program Standard No. 17 that was incorporated by reference in a single section of the school bus regulations. The Court of Appeals concluded that the CTA's school-to-school services did not come within the "charter bus operations" definition by stating that the services were "school bus operations." The pertinent part of § 605.12, *supra,* which specifically includes incidental school-to-school bus operations in "charter bus operations," was not explained or even referred to by the Court of Appeals.

Although only the interpretation of the UMTA regulations was at issue in this argument, the Court of Appeals felt it necessary to overrule the clear language of the regulations by contending that "the legislative history establishes that the disputed services are school bus rather than charter bus operations." App. A, p. A15. The material the court cites, however, shows that Congress considered more stringent language which would have defined school bus operations to include the services at issue here. This language was rejected in conference committee. See App. A, pp. A15-A16.

The regulations relating to school bus operations and charter bus operations are comprehensive and interrelated. Reading the pertinent provisions together, it is clear that the use of federally-funded buses to transport school students from one school to another is proper in off-peak hours. The decision of the court below is erroneous.

B. UMTA REGULATIONS WHICH DO NOT ALLOW THE CTA TO USE FEDERALLY-FUNDED BUSES TO ENGAGE IN OFF-PEAK HOUR SCHOOL-TO-SCHOOL BUS SERVICES ARE VOID FOR INCONSISTENCY WITH GRANDFATHER CLAUSE PROVISIONS OF 49 U. S. C. §§ 1602(g) AND 1602a(b).

The CTA is exempted from the school bus prohibition by the grandfather clauses in both § 164(b) of the Federal-Aid Highway Act of 1973, 49 U. S. C. § 1602a(b), and § 3(g) of the

Urban Mass Transportation Act of 1964, as amended, 49 U. S. C. §1602(g). The clause in the Federal-Aid Highway Act reads:

> ". . . [T]his subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting school children and personnel along with facilities to be used therefor) was so engaged in school bus operations any time during the twelve-month period immediately prior to August 13, 1973." 49 U. S. C. § 1602a(b).

Section 3(g) of the Urban Mass Transportation Act contains the identical language except that the grandfather period is the twelve months immediately prior to November 24, 1974. 49 U. S. C. § 1602(g). It is undisputed that CTA provided school-to-school service during both twelve-month periods.

The Court of Appeals concluded that the grandfather clause exempts an agency, but not the facilities it uses, except those facilities mentioned in the parenthetical clause concerning predecessors in interest. Under the court's strained interpretation of the statute, an agency which itself met the twelve-month period would not be exempt as to its federally-funded buses, but another agency which acquired federally-funded buses from a direct predecessor in interest that engaged in school bus operations during the grandfather period would be exempt as to those federally-funded buses. See App. A, p. A18. This illogical result follows from the court's conclusion that an exemption applies to the agency, but not to its facilities.

The statutory reference to "along with facilities to be used therefor" relates to the necessity for acquiring the facilities, as well as the function, of school bus operations from a predecessor in interest. The sentence should be read: "[T]his subsection shall not apply with respect to any . . . agency . . . if it (or a direct predecessor in interest from which it acquired [1] the function . . . along with [2] facilities . . .) was so engaged in school bus operations any time during [the required period]." Grammatically the word "facilities" is one of two objects of the verb "acquired." It is not the object of the verb "apply," as UMTA argued. Without this provision an agency could qualify under the grandfather clauses by taking over only the function of a predecessor. With the provision, on the other hand, a school board which itself had transported students for the required time period could turn over the function to a public transit authority only by turning over the school bus facilities it owned as well.

If the statutory exemptions do not apply to funded buses, as well as transit authorities, then the exemptions become meaningless. Another exemption in the statute, for example, allows a transit authority to engage in school bus operations where private bus companies are not safe and adequate.

> "This subsection shall not apply unless private school bus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards. . . ." 49 U. S. C. § 1602a(b).

It would be ridiculous to assume, as UMTA and the Court of Appeals did, that Congress intended that a transit authority could offer safe transportation to school children during off-peak hours, when its federally-funded buses would not be in use, only if it had unfunded buses. The exemptions must therefore refer to funded as well as unfunded buses.

UMTA and the court also relied on 49 U. S. C. § 1602(a)(1), which states that UMTA grants can only be made for facilities that will be used in mass transportation. The court notes that mass transportation is defined to exclude school buses. 49 U. S. C. § 1608(c)(5). But in 1966 the Comptroller General issued an advisory opinion interpreting the limiting language in the definition of mass transportation. Opinion of the Comptroller General of the United States, B-160204 (Dec. 7, 1966). The opinion stated "that any lawful use of project equipment which does not detract from or interfere with the

urban mass transportation service for which the equipment is needed would be deemed an incidental use of such equipment, and that such use of project equipment is entirely permissible under our legislation." The limiting language in the definition has not subsequently been amended, and UMTA continues to rely upon this opinion as a basis for its rules and regulations. See 49 C. F. R., part 604, App. A and 49 C. F. R., part 605, App. A.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-2396

CHICAGO TRANSIT AUTHORITY, a municipal corporation,
Plaintiff-Appellee,

vs.

BROCK ADAMS,
Secretary of the Department of Transportation, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-C-2771—Bernard M. Decker, *District Judge.*

ARGUED SEPTEMBER 14, 1979—DECIDED NOVEMBER 29, 1979

Before SWYGERT, TONE, and WOOD, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This appeal concerns section 164(b) of the Federal-Aid Highway Act of 1973, 49 U. S. C. § 1602a(b), section 3(g) of the Urban Mass Transportation Act of 1964, *as amended,* 49 U. S. C. 1602(g), and the regulations promulgated thereunder, 49 C. F. R. § 604 *et seq.*[1] At

1. Section 164(b) of the Federal-Aid Highway Act of 1973, 49 U. S. C. § 1602a(b), provides:

> No Federal financial assistance shall be provided . . . for the purchase of buses to any applicant for such assistance unless such applicant and the Secretary of Transportation shall have

(Footnote continued on next page.)

issue is whether a grantee of the Urban Mass Transportation Administration ("UMTA") can provide daily bus service in buses purchased with federal funds for students traveling to their schools of regular attendance from a common departure point at a neighborhood school each morning and back to the neighborhood school for delivery at the end of the school day.

The decision of the chief counsel of UMTA that such bus service constituted impermissible school bus operations by a federal grantee was overturned by the district court on the ground that the UMTA decision violated an agency regulation. We have concluded that the chief counsel's decision was a reasonable interpretation of the statute and regulations and therefore must be reinstated. The decision of the district court is accordingly reversed.

(Footnote continued from preceding page.)

> first entered into an agreement that such applicant will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators. . . . [T]his subsection shall not apply with respect to any State or local public body or agency thereof if it, (or a direct predecessor in interest from which it acquired the function of so transporting school children and personnel along with facilities to be used therefor) was so engaged in school bus operations any time during the twelve-month period immediately prior to August 13, 1973. . . .

Section 3(g) of the Urban Mass Transportation Act of 1964, *as amended,* 49 U. S. C. § 1602(g), is similar:

> No Federal financial assistance shall be provided under this chapter for the construction or operation of facilities and equipment for use in providing public mass transportation service to any applicant . . . unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in schoolbus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators . . . . [T]his subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting schoolchildren and personnel along with facilities to be used therefor) was so engaged in schoolbus operations any time during the twelve-month period immediately prior to November 26, 1974. . . .

I.

The services at issue are daily bus transportation of groups of Chicago public school students each morning from a common pick-up point at a neighborhood school to a common delivery point at the school that the children attend and back from the school attended to the neighborhood school delivery point at the end of the school day. These services have been used to transfer students from neighborhood schools to less crowded schools or schools offering special facilities or programs. Recently, they have been used to implement the Chicago Board of Education's voluntary desegregation program.

In June 1974, the Chicago Transit Authority ("CTA") entered into an agreement with UMTA in accordance with the terms of the Urban Mass Transportation Act of 1964, *as amended,* 49 U. S. C. §§ 1601 *et seq.,* whereby the federal agency agreed to provide financial assistance for CTA's purchase of passenger buses, rapid transit cars and related equipment (Project No. IL-03-0040.) The grant contract included a provision prohibiting CTA from engaging in school bus operations in competition with private school bus operators, as required by sections 1602a(b) and 1602(g) of Title 49.[2]

Shortly thereafter, in December 1974, the Chicago Board of Education solicited bids from various bus companies for the transportation of students attending Chicago public schools. Bradford School Bus Transit, Inc. ("Bradford") and the CTA were among those bidding to provide these services, which are identical to the kind of services at issue here. The CTA's bid was accepted, and it has been providing bus transportation for Chicago public school children since January 1975.

In December 1976, Bradford and other private school bus operators, including A & D Davenport Transportation, filed a complaint with UMTA against the CTA, alleging that CTA had violated its June 1974 agreement with UMTA by engaging

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2. *Id.*

in school bus operations.[3] In his decision, the chief counsel of UMTA concluded that according to UMTA's regulations, the bus service at issue did not constitute school bus operations but was instead permissible incidental charter service.[4] He reached this decision because the disputed services did not involve multiple student pick-ups and deliveries but rather had a common pick-up and delivery point for all students. *A & D Davenport Transportation, et al.* v. *Chicago Transit Authority*, decided May 5, 1977.

Bradford filed a second complaint with UMTA in April 1977, challenging services provided by CTA which were identical in character to those challenged in the first suit but which involved different contracts and different bus routes. After considering Bradford's complaint and the CTA's response, the chief counsel of UMTA concluded that the *Davenport* case had been decided erroneously and that the disputed services were school bus operations. *Bradford School Bus Transit, Inc.* v. *Chicago Transit Authority*, decided April 25, 1978. The chief counsel decided that the multiple as opposed to single pick-up and delivery point distinction relied on in *Davenport* did not determine whether services were "school bus operations," and that the regulation was silent on the issue of whether school bus service included anything more than multiple pick-ups and deliveries. After examining the legislative history the chief counsel decided that the disputed services were prohibited school bus operations. The *Bradford* decision made clear that UMTA was reversing its earlier decision and would hereinafter consider the daily use of UMTA funded buses for transportation of groups of students to their schools of regular attendance to be school bus operations.

3. The complaint was filed pursuant to 49 C. F. R. § 605.30 which provides:

> Any interested party may file a complaint with the Administrator alleging a violation or violations of terms of an agreement entered into pursuant to § 605.14. A complaint must be in writing, must specify in detail the action claimed to violate the agreement, and must be accompanied by evidence sufficient to enable the Administrator to make preliminary determination as to whether probable cause exists to believe that a violation of the agreement has taken place.

The regulations provide for notification, investigation, adjudication and judicial review. 49 C. F. R. §§ 605.30 *et seq.*

4. The UMTA regulation defining school bus operations provides:

> 'School bus operations' means transportation by bus exclusively for school students, personnel and equipment in Type I and Type II school vehicles as defined in Safety Program Standard No. 17.

49 C. F. R. 605.3(b).

"Charter bus operations" are defined as:

> . . . transportation by bus of a group of persons who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles or service, in accordance with the carrier's tariff, have acquired the exclusive use of a bus to travel together under an itinerary either agreed on in advance, or modified after having left the place of origin. (This includes the incidental use of buses for the exclusive transportation of school students, personnel and equipment.)

49 C. F. R. 604.3(b).

The CTA had argued that, even if the services were decided to be school bus operations, it was exempt from the prohibition because of the "grandfather" clauses contained in both sections:

> . . . . [T]his subsection shall not apply with respect to any State or local public body or agency thereof if it . . . was so engaged in school bus operations any time during the twelve-month period immediately prior to [the date of enactment].

49 U. S. C. § 1602a(b), 49 U. S. C. 1602(g).

Section 164(b) of the Federal-Aid Highway Act, 49 U. S. C. § 1602a(b), was enacted on August 13, 1973, and section 3(g) of the Urban Mass Transportation Act, 49 U. S. C. § 1602(g), was enacted on November 26, 1974. It was undisputed that the CTA was providing service during both of these periods. However, UMTA decided that even a grantee who was exempted from the schoolbus prohibition by the grandfather clauses could

not provide school bus service in federally-funded buses. The CTA buses had been purchased with federal funds. CTA was permitted to complete its contract for the 1977-78 school year but was prohibited from performing the services after that time.

CTA responded to the UMTA decision by bringing this action in the United States District Court for the Northern District of Illinois for declaratory and injunctive relief against enforcement. Named as defendants were the Secretary of Transportation and the administrator and chief counsel of UMTA. In an opinion and order dated August 23, 1978, the district court held that the agency's *Bradford* decision was invalid and must be set aside because UMTA's own regulations mandated a finding that the disputed services were charter rather than school bus operations.[5] The district court remanded the case to UMTA to determine whether the service was "incidental" as well as "charter," since only "incidental charter service" is permissible.[6] From the decision of the district court, setting aside the opinion of the chief counsel, UMTA brings this appeal.

II.

A. *School Bus Regulations and the Safety Standard*

The regulation defining school bus operations contains a cross-reference to Highway Safety Program Standard No. 17:

> . . . transportation by bus exclusively for school students . . . in Type I and Type II school vehicles as defined in Highway Safety Program Standard No. 17.

49 C. F. R. § 605.3(b).

Highway Safety Program Standard No. 17, 23 C. F. R. § 1204.4, promulgated by the National Highway Traffic Safety Administration ("NHTSA"), defines Type I vehicles as "any motor vehicle used to carry more than 16 pupils to and from school," and

5. *Id.*

6. *Id.*

Type II vehicles as motor vehicles "used to carry 16 or less pupils to or from school." 23 C. F. R. § 1204.4.[7]

UMTA and the district court disagree about the significance of the cross-referenced safety standard to the decision of this

7. Relevant portions of Highway Safety Standard No. 17, 23 C. F. R. § 1204.4 are set out below. Section III contains the "to and from school" language.

PUPIL TRANSPORTATION SAFETY

I. *Scope.* This standard establishes minimum requirements for a State highway safety program for pupil transportation safety; including the identification, operation, and maintenance of school buses; training of personnel; and administration.

II. *Purpose.* The purpose of this standard is to reduce, to the greatest extent possible, the danger of death or injury to schoolchildren while they are being transported to and from school.

III. *Definitions.* "Type I school vehicle" means any motor vehicle with motive power, except a trailer, used to carry more than 16 pupils to and from school. . . .

"Type II school vehicle" means any motor vehicle used to carry 16 or less pupils to or from school. This does not include private motor vehicles used to carry members of the owner's household. . . .

IV. *Requirements.* . . .

. . . .

B. *Identification and equipment of school vehicles.* . . .

. . . .

2. Type I school vehicles that are operated by a privately or publicly owned local transit system, and used for regular common carrier transit route service as well as special school route service, shall meet all of the requirements of this standard, except as follows:

a. Such vehicles need not be painted yellow and black as required by paragraphs 1(b) and 1(c) of this section.

b. In lieu of the requirements of paragraph 1(a) of this section, such vehicles shall, while transporting children to and from school, be equipped with temporary signs, located conspicuously on the front and back of the vehicle. The sign on the front shall have the words "School Bus" printed in black letters not less than 6 in. high, on a background of national school bus glossy yellow, as specified in paragraph 1(b) of this section.

(Footnote continued on next page.)

case. According to the district judge, the "to and from school" language in the safety standard is an "operational definition" of school bus operations. He has interpreted "to and from

(Footnote continued from preceding page.)

The sign on the rear shall be at least 10 ft. in size and shall be painted national school bus glossy yellow, as specified in paragraph 1(b) of this section, and have the words "School Bus" printed in black letters not less than 8 in. high. Both the 6-in. and 8-in. letters shall be Series "D" as specified in the Standard Alphabets—Federal Highway Administration, 1966.

. . . .

C. *Operations*. . . .

. . . .

2. *Pupil instruction.* At least twice during each school year, each pupil who is transported in a school vehicle shall be instructed in safe riding practices, and participate in emergency evacuation drills.

3. *Vehicle operations*. . . .

. . . .

d. *Seating.* (1) Seating shall be provided that will permit each occupant to sit in a seat in a plan view lateral location, intended by the manufacturers to provide seating accommodation for a person at least as large as a 5th percentage adult female, as defined in 49 C. F. R. 571.3.

(2) Bus routing and seating plans shall be coordinated so as to eliminate standees when a school vehicle is in motion.

(3) There shall be no auxiliary seating accommodations such as temporary or folding jump seats in school vehicles.

(4) Drivers of school vehicles equipped with lap belts shall be required to wear them whenever the vehicle is in motion.

(5) Passengers in Type II school vehicles equipped with lap belts shall be required to wear them whenever the vehicle is in motion.

D. *Vehicle maintenance.* Each State shall establish and maintain compliance with the following requirements for vehicle maintenance:

1. School vehicles shall be maintained in safe operating conditions through a systematic preventive maintenance program.

. . . .

3. School vehicle drivers shall be required to perform daily pretrip inspections of their vehicles, and to report promptly and in writing any defects or deficiencies discovered that may affect the safety of the vehicle's operation or result in its mechanical breakdown. . . .

school" to encompass only home to school transportation and not the school to school services disputed here. The trial judge thus concluded that the disputed services were not school bus operations because they were not transportation "to and from school." Safety Standard No. 17, 23 C. F. R. § 1204.4.[8] UMTA, on the other hand, did not consider the "to and from school" language contained in the safety standard in reaching its decision. The agency believed the cross-reference in its regulation defined only the "physical characteristics of school bus vehicles," was not an "operational definition," and was not relevant to the decision of the case.

The cross-referenced safety standard "to and from school" language is more restrictive than the language in the school bus operations regulation itself. The regulation, 49 C. F. R. § 605.3 (b), defines school bus operations as "transportation by bus exclusively for school students," but that language could include transportation that is not "to and from school" as required by the safety standard, 23 C. F. R. § 1204.4. We therefore conclude that the cross-referenced language in the standard limits the language in the regulation, and the district court was correct to consider the phrase "to and from school" in interpreting the regulation defining school bus operations. However, an analysis of the safety standard language and its interpretation by NHSTA, which promulgated the standard, compels us to disagree with the district court's conclusion. We are persuaded, as UMTA has argued on appeal, that "to and from school" includes the services at issue here.

The starting point for understanding the "to and from school" language, as in every case involving construction of a regulation or statute, is the language itself. *Greyhound* v. *Mt. Hood Stages, Inc.*, 437 U. S. 322 (1978); *Rucker* v. *Wabash R. Co.*, 418 F. 2d 146 (7th Cir. 1969). Words are to be given their ordinary meaning absent persuasive reasons to the contrary. *Chrobak* v. *Metropolitan Life Ins. Co.*, 517 F. 2d 883 (7th Cir. 1975).

8. *Id.*, section III.

The ordinary meaning of "to and from school" in describing vehicles used to transport students would seem to be transportation for purposes of school attendance at the beginning and end of the school day.[9] That meaning would include the services at issue here, since students are taken "to" their schools of regular attendance each morning and "from" their schools of regular attendance each afternoon. We see nothing in the plain meaning of "to and from school" that would exempt these services because there is a common neighborhood departure and delivery point rather than multiple such points.

A court only has " 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute.' But it is otherwise 'where no such consequences would follow . . . .' " *Commissioner* v. *Brown, et al.*, 380 U. S. 563, 571 (1965) (citations omitted), quoting *Helvering* v. *Hammel*, 311 U. S. 504, 510-511 (1941). Apparently the trial judge believed that a restricted meaning of "to and from school" was called for by the legislative purpose of the safety standard, which he concluded was "to alleviate the special dangers created by multiple, on the road pickups of school children." We cannot agree that the safety requirements contained in the standard were only to protect against the hazards of multiple pick-up and delivery. There is nothing in the standard to indicate such a limited purpose. The purpose stated in the standard is "to reduce, to the greatest extent possible, the danger of death or injury to school children while they are being transported to and from school"; its scope is described as the establishment of "minimum requirements for a state highway safety program for pupil transportation safety, including the identification, operation, and maintenance of schoolbuses; training of personnel; and administration."[10] Such broad lan-

9. *Id.*, section III.

10. *Id.*, sections I and II.

guage indicates that the standard was designed to be a general safety provision for school bus operations.

Specific provisions of the standard bear out this broader interpretation. Instruction in safe riding practices and drills in emergency evacuation procedures are required twice during each school year.[11] The need for safe riding practices and knowledge of emergency evacuation procedures is as great when students are being transported daily to and from their schools of regular attendance whether there is group or individual pick-up and delivery. Likewise for the seating provision, prescribing the minimum size of bus seats, prohibiting jump seats and requiring students to wear seat belts under certain conditions.[12] Under vehicle maintenance, the standard requires drivers to perform daily pretrip inspections and report any defects.[13] This safety requirement also bears no relation to whether students embark and disembark singly or as a group.

Although NHTSA, which promulgated the safety standard, has never decided whether "to and from school" includes bus services like those disputed here, it has twice issued statements clarifying the meaning of "to and from school." An analysis of the agency's definition of its own language persuades us that the disputed services are included.

In 1977 the chief counsel of NHTSA stated in a memorandum that "to and from school" included any "trip from a school-related event" since "children are no less deserving of protection when on their way to a football game or a band concert." (Memorandum of NHTSA Acting Chief Counsel, May 5, 1977.) In 1974 NHTSA guidelines had defined "to and from school" as "transportation of school children and school personnel from their homes or the nearest bus stop to their assigned school

11. *Id.*, section IV C(2).

12. *Id.*, section IV C 3(d).

13. *Id.*, section IV D 3.

building for classroom studies and return." NHTSA Notice 900, April 11, 1974.[14]

The UMTA regulation defining school bus operations,, which incorporates by cross-reference the "to and from school" language contained in the safety standard, was issued in March, 1976, after the April 1974 NHTSA interpretation but prior to the 1977 agency revision.[15]

It is clear that the services at issue here fit the 1974 notice language of "transportation . . . to [an] assigned school building for classroom studies and return." (NHTSA Notice 900, April 11, 1974.)[16] Further, because the neighborhood school is used not for classroom attendance but merely as a location for pick-up and delivery for students traveling to their attendance schools, the neighborhood school is the "nearest bus stop" specified in the 1974 NHTSA notice.[17]

14. The 1977 memorandum stated:

> Some time ago your office asked for our interpretation of the phrase "to and from school," in Highway Safety Program Standard 17, Pupil Transportation Safety. . . . It is my opinion that the interpretation contained in Notice 900 [dated 4/11/74] is excessively narrow, and that the phrase should include any trip for a school related activity.
>
> . . . [T]he purpose of Standard No. 17 is to protect school children and children are no less deserving of protection when on their way to a football game or band concert than when on their way from home to school. NHTSA Memorandum of May 5, 1977.

The 1974 NHTSA notice contains the following language:

> 5. What do you mean by 'to and from school?'
>
> ANSWER: This means for purposes of Standard 17, the transportation of school children and school personnel from their homes or the nearest bus stop to their assigned school building for classroom studies and return.

NHTSA Notice 900, issued April 11, 1974.

15. *See* note 4, *supra,* where the school bus operation regulation is set out.

16. *See* note 14, *supra.*

17. *Id.*

The plain meaning of "to and from school" includes the disputed services. Further we have concluded, in contrast to the trial judge, that the ordinary meaning supports rather than thwarts the purpose of the safety standard. Finally, the agency's clarification of the relevant language indicates that "to and from school" includes these services. Therefore we cannot agree with the district court that the agency decision violated the school bus operations regulations because the services were not "to and from school."

B. *The Charter Bus Operations Regulation*

The disputed services are "transportation by bus exclusively for school students" in vehicles used to carry students "to and from school," the language of the UMTA regulation defining school bus operations.[18] However, another UMTA regulation permits charter bus operations and defines charter operations to include "the incidental use of buses for the exclusive transportation of school students."[19] Because some "exclusive transportation of school students" is charter bus operations, it is clear that not all "transportation by bus exclusively for school students" is school bus operations. According to the trial judge, the services at issue here are charter rather than school bus operations. We reach the opposite conclusion.

Charter bus operations are defined in the UMTA regulation as:

> transportation by bus of a group of persons who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles of service, in accordance with

18. *See* notes 4 and 7, *supra.* Although the regulation refers to the use of Type I and Type II school vehicles specified in Highway Safety Program Standard No. 17, 23 C. F. R. § 1204.4, the standard authorizes the use of standard buses made for use in common carrier transit route service provided that the buses are marked as specified in the regulation. *See* n. 7, *supra,* paragraph IV B.2. The CTA was using buses so marked.

19. *See* note 4, *supra.*

> the carrier tariff, have acquired the exclusive use of a bus to travel together under an itinerary, either agreed on in advance or modified after having left the place of origin. (This includes the incidental use of buses for the exclusive transportation of school students, personnel and equipment.)

49 C. F. R. § 604.3.

We do not believe that the daily transportation of students to and from their schools of regular attendance was intended to be charter bus service under the regulation. Although there is nothing in the language of the charter bus service regulation that would exempt the disputed services, the same can be said for the language in the regulation defining school bus operations.[20] Since the transportation here is daily service to and from school at the beginning and end of the school day, it is indistinguishable from undisputed school bus operations except for the common point of pick-up and delivery. Although that distinction permits the services to fit technically within the "charter bus operation" language, we believe that the language of the charter regulation describes a single trip or series of trips for school students rather than daily transportation at the beginning and end of each school day when it speaks of groups traveling under a "single contract" and "under an itinerary, either agreed on in advance or modified after having left the place of origin."[21] The school bus operations regulation, on the other hand, speaks of transportation "to and from school," language which we have concluded describes the daily transportation of students to and from their schools of regular attendance at the beginning and end of the school day.

20. As we read the regulation, the parenthetical sentence, which specifies when services involving transportation of students are included, assumes that such services first meet the requirements of the nonparenthetical portions of the regulation. It is a technical reading of the nonparenthetical portion that we refer to as not exempting the disputed services. Because we ultimately conclude that the disputed services do not fit within the nonparenthetical language of the regulation, we do not reach the issue of "incidental use" raised in the parenthetical sentence.

21. *See* note 4, *supra.*

Therefore these services better fit the ordinary meaning of the language of the school bus operations regulation.

Further, we agree with UMTA that the legislative history establishes that the disputed services are school bus rather than charter bus operations. It is undisputed that the purpose of the school bus provision was to prevent competition with private school bus operators, competition perceived by Congress to be unfair. House Conf.. Rept. No. 93-410 at 87 (1973); Sen. Conf. Rept. No. 93-355 at 87 (1973). The original House proposal for what would become section 164(b) of the Federal-Aid Highway Act of 1973, 49 U. S. C. § 1602a(b), would have prohibited a recipient of federal aid from providing transportation for students "to and from school and *school authorized functions.*" S. 502, 93rd Cong., 1st. Sess., § 123 (emphasis added).[22] During debate on the House bill, an amendment to the Urban Mass Transportation Act, 49 U. S. C. § 1601 *et seq.*, was proposed which also prohibited grantees from transporting students "to and from school and *school authorized functions.*" 119 Cong. Rec. 13266 (1973) (remarks of Congressman Wright) (emphasis added).[23] In conference, the language was

22. The House bill would have prohibited financial assistance to "any State or local public body or agency thereof which engages directly or indirectly in the transporting of school children and school personnel to and from school and school-authorized functions in competition with or supplementary to the service currently provided by a private transportation company or other person engaged in so transporting such children and personnel." S. 502, 93rd Cong. 1st Sess., § 123.

23. The Amendment, which was offered by Congressman Wright, provided:

> "No financial assistance shall be provided under this Act to any State or local public body or agency thereof which engages directly or indirectly in the transporting of school children and school personnel to and from school and school-authorized functions or which proposes to expand present route schedules, service or facilities for the purpose of providing transportation for schoolchildren and school personnel to and from school and school-authorized functions in competition with or supplemen-

(Footnote continued on next page.)

changed to that enacted in both statutes, prohibiting "school bus operations in competition with private school bus operators."[24] The final language was explained by the chairman of the House Transportation Subcommittee who was also a House Conferee as not precluding "*individual* charter-type trips" by UMTA grantees. 119 Cong. Rec. 28102 (1973) (remarks of Congressman Kluczynski) (emphasis added).[25] The conference version was a compromise because even individual trips would have been forbidden by the House proposals precluding transportation for school authorized functions.

After examining the legislative record, we are persuaded that Congress intended to bar federal grantees from competing with private operators in daily bus transportation to and from the students' school of regular attendance, while at the same time permitting grantees to transport students on school trips. Therefore, we agree with UMTA that the disputed services are school rather than charter bus operations.

C. *Grandfather Clauses and Federally-Funded Buses*

The CTA argues that even if we decide that the services are school bus operations, the CTA is exempted from the school bus prohibition by the "grandfather" clauses in both section 164(b) of the Federal-Aid Highway Act of 1973, 49 U. S. C. § 1602a(b), and Section 3(g) of the Urban Mass Transporta-

(Footnote continued from preceding page.)

tary to the service currently provided by a private transportation company, or other person, engaged in so transporting such children and personnel." 119 Cong. Rec. 13266, April 19, 1973.

24. *See* note 1, *supra.*

25. Congressman's Kluczynski's remarks were as follows:

". . . [E]ither a school bus, if operated by a public body, or a public mass transit bus can be used on individual charter-type trips to transport school-children to various points of interest within the actual geographic area serviced by the school bus operation or the city mass transit bus operation." 119 Cong. Rec. 28102 (1973).

tion Act of 1964, *as amended,* 49 U. S. C. § 1602(g). The clause in the Federal-Aid Highway Act reads:

> . . . [T]his subsection shall not apply with respect to any state or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting school children and personnel along with facilities to be used therefor) was so engaged in school bus operations any time during the twelve-month period immediately prior to August 13, 1973.

49 U. S. C. § 1602(g).

Section 3(g) of the Urban Mass Transportation Act contains the identical language except that the exempted period is the twelve months immediately prior to November 24, 1974.[26] It is undisputed that CTA provided service during both twelve-month periods.

As UMTA reads the statutes, the CTA—although a "grandfathered" grantee and therefore otherwise exempt—cannot engage in school bus operations using federally-funded buses. CTA concedes that its buses were purchased with federal aid, but argues that UMTA's interpretation of the clauses to prohibit the use of federally-funded buses is erroneous.

According to UMTA, the plain language of the grandfather clauses exempts only a "state or local public body or agency thereof" and not the facilities it uses.[27] As UMTA reads the statutes, CTA is exempted because they performed the services during the twelve-month period prior to the statutory enactments, and CTA can continue to perform these services in buses not purchased with federal funds. UMTA would permit federally-funded buses to be used by a grandfathered grantee only in the one situation where "facilities" are specifically mentioned in the clauses:

> [T]his subsection shall not apply . . . to any state or local public body or agency thereof if it (or a direct predecessor

26. *See* note 1, *supra.*

27. *Id.*

> in interest from which it acquired the function of so transporting school children and personnel along with *facilities* to be used therefore) . . . .

49 U. S. C. § 1602a(b), 49 U. S. C. § 1602(g) (emphasis added).

Federally-funded buses would be exempted only where they have been acquired from a direct predecessor in interest who engaged in school bus operations during the grandfather period.

In support of its interpretation, UMTA points to a provision of the Urban Mass Transportation Act of 1964, *as amended,* which states that UMTA grants can only be made for facilities that will be used in mass transportation. 49 U. S. C. § 1602 (a)(1).[28] Mass transportation is specifically defined elsewhere in the statute to exclude school buses.[29] Thus UMTA concludes that federally-funded buses cannot be used for school bus operations unless the buses themselves are specifically exempted.

UMTA's interpretation of the statute to forbid school bus operations in federally-funded buses has been codified in an UMTA regulation:

> No grantee or operator of project equipment shall engage in school bus operations using buses, facilities or equipment

28. The Secretary is authorized, . . . to make grants or loans . . . to assist States and local public bodies and agencies thereof in financing (1) the acquisition, construction, reconstruction, and improvement of facilities and equipment for use, by operation or lease or otherwise, in mass transportation service in urban areas and in coordinating such service with highway and other transportation in such areas, and (2) the establishment and organization of public or quasi-public transit corridor development corporations or entities. . . .

49 U. S. C. § 1602(a)(1).

29. "[T]he term 'mass transportation' means transportation by bus, rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (*but not including school buses* or charter or sightseeing service) on a regular and continuing basis."

49 U. S. C. § 1608(c)(5) (emphasis added).

> funded under the [Federal-Aid Highway or Urban Mass Transportation] Acts. . . .

49 C. F. R. § 605.12.

In the preamble to its school bus regulations, UMTA states:

> Greater emphasis is placed in the current version on the fact that federally-assisted buses, facilities, and equipment may not be used for the exclusive transportation of school students, personnel or equipment. Even if a federally-assisted operator is allowed to engage in school bus operations under one of the exemptions listed in sections 3(g) and 164(b), the operator cannot use federally-assisted buses, facilities and equipment in those operations.

49 C. F. R. § 605 (preamble).

The validity of a regulation promulgated under statutory authority will be sustained so long as it is "reasonably related to the statutory purpose." *Thorpe* v. *Housing Authority of City of Durham,* 393 U. S. 268, 280-281 (1969); *Mourning* v. *Family Publications Service, Inc.,* 411 U. S. 356 (1973); *Mirabel* v. *General Motors Acceptance Corp.,* 537 F. 2d 871, n. 23 (7th Cir. 1976). Therefore if we find the UMTA regulation prohibiting the use of federally-funded buses in school bus operations to be reasonably related to the purpose of the statutes, we must sustain the UMTA regulation. The declared purpose of the Urban Mass Transportation Act is to improve mass transportation.[30] The Act requires that grants be given only for the purchase of buses to be used in mass transportation. 49 U. S. C. § 1602(a)(1).[31] As we point out below, UMTA has interpreted

30. "The purposes of this chapter are—

(1) to assist in the development of improved mass transportation . . . .

(2) to encourage the planning and establishment of area-wide urban mass transportation systems. . . .

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems. . . ."

49 U. S. C. § 1601(b).

31. *See* note 28, *supra.*

the Acts to prohibit federally-funded buses in school bus operations so as to preserve these buses for use in mass transportation.

In order to understand UMTA's reasoning, it is helpful to reconsider the regulation defining charter bus operations.[32] Even permissible charter bus operations for school students are restricted to "incidental use."[33] When buses are transporting students in incidental charter service, federally-funded buses may be used:

> No grantee or operator of project equipment shall engage in school bus operations using buses, facilities or equipment funded under the Acts. A grantee or operator may, however, use such buses, facilities and equipment for the transportation of school students, personnel and equipment in incidental charter bus operations . . . .

49 C. F. R. § 605.12.

The word "incidental" has been defined in the regulations:

> 'Incidental' means charter bus operations during off-peak hours which does not interfere with regularly scheduled service to the public. . . .

49 C. F. R. 605.3(b).

Although UMTA permits the use of federally-funded buses in incidental charter service, the statutory purpose has been preserved because the charter service is limited to non-peak hours when the federally-funded buses are least likely to be needed for mass transportation. The use of federally-funded buses for school bus operations, on the other hand, would as a rule not retain the buses for their intended use in mass transportation.

> "Incidental use of federally-assisted buses is a use which does not interfere with regularly scheduled mass transportation service to the public. By nature of their definitions, the terms 'school bus operations' and 'incidental use' are mutually exclusive as defined in these final regulations. Since school bus operations are usually undertaken in peak

32. *See* note 4, *supra.*

33. ***Id.***

> morning and evening hours, the incidental use of federally-assisted buses during these times is not possible."

49 C. F. R. § 605 (preamble).

UMTA's regulation prohibiting the use of federally-funded buses in school bus operations is consistent with the statutory purpose of preserving buses purchased with UMTA funds for use in mass transportation. Because the regulation prohibiting the use of federally-funded buses in school bus operations is "reasonably related to the statutory purpose," it is valid. *Thorpe* v. *Housing Authority of City of Durham,* 393 U. S. 268, 280-281 (1969); *Mourning* v. *Family Publications Service, Inc.,* 411 U. S. 356 (1973); *Mirabel* v. *General Motors Acceptance Corp.,* 537 F. 2d 871, n. 23 (7th Cir. 1976). Accordingly, though CTA falls within the statutory exemption because it was providing service during the two twelve-month "grandfather" periods, it cannot provide school bus service in its federally-funded buses.

We are persuaded that UMTA has not violated the statute or its own regulations. Moreover, we do not find any of UMTA's relevant regulations to be invalid.

The judgment of the district court is reversed.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Chicago Transit Authority,
Plaintiff,
vs.
Brock Adams, Secretary of the Department of Transportation, et al.,
Defendants.

No. 78 C 2711

MEMORANDUM OPINION AND ORDER

This is an action for declaratory and injunctive relief against enforcement of a decision by the Chief Counsel of the Urban Mass Transportation Administration ("UMTA") precluding the plaintiff, the Chicago Transit Authority ("CTA") from using federally subsidized equipment in connection with contracts to provide certain bus services to the Chicago Board of Education. The plaintiff contends that this decision will bar it from providing services for the Chicago Board of Education's voluntary integration program scheduled to begin this September. The defendants are the Secretary of the Department of Transportation, the Administrator of the UMTA, and the Chief Counsel of the UMTA. The case is now before the court on the plaintiff's motion for preliminary injunction, and the defendants' motion for summary judgment.

The essential facts are not in dispute; the case rests on an interpretation of the Urban Mass Transportation Act, 49 U. S. C. §§ 1601 *et seq.*, and the regulations promulgated there-

under, 49 C. F. R. §§ 604, *et seq.* The UMTA ruling in dispute is entitled *Bradford School Bus Transit, Inc.* v. *Chicago Transit Authority,* and was rendered on April 25, 1978. The Bradford School Bus Transit company complained to UMTA when it lost a bid for a contract with the Chicago Board of Education in December, 1974.[1] The accepted bid was by the CTA, and thereafter, the CTA provided the following services:[2]

1. The complaint was filed pursuant to 49 C. F. R. § 605.30 which provides that:

> "Any interested party may file a complaint with the Administrator alleging a violation or violations of terms of an agreement entered into pursuant to § 605.14. A complaint must be in writing, must specify in detail the action claimed to violate the agreement, and must be accompanied by evidence sufficient to enable the Administrator to make a preliminary determination as to whether probable cause exists to believe that a violation of the agreement has taken place."

The regulations provide for notification, investigation, and adjudication and judicial review, 49 C. F. R. §§ 605.30 *et seq.*

2. While Services B and C involve school-to-school transportation, Service A involved on-the-street pick ups:

> "*Service A*: Transportation of Haven School pupils who have been transferred to the Ward School:
>
> 1. One bus to accommodate approximately 40 pupils who are involved in this program.
> 2. Vehicle must be available each school day with a reporting time of 8:30 a.m. to the first pick-up point at 729 South State Street. There are six other points of pick-up. The last of which is Archer and State. Bus arrival time at the Ward School, 2701 South Shields Avenue, is approximately 8:50 a.m.
> 3. Reporting time to the Ward School in the afternoon is to be 2:15 p.m. with the pupils being returned to their respective pick-up points."

In an earlier ruling, *A & D Davenport, et al.* v. *CTA,* dated May 5, 1977, Chief Counsel James Christian ruled that the multiple stop, on-the-road pick-up service described in Service A is a "school bus operation". The plaintiff apparently discontinued Service A after that ruling, and it has not been resumed. The plaintiff has not disputed this ruling.

To the contrary, the plaintiff argues that the *Davenport* decision is *res judicata* in this case inasmuch as the Chief Counsel there ruled

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"*Service B*:

1. Ten (10) buses are needed to transport 500 pupils involved in this program.
2. Vehicles must be available each school day with a reporting time at the Brennan School, 11411 South Eggleston Avenue, to be at 8:20 a.m. Leaving time from Brennan is to be 8:30 a.m. with an estimated time of arrival at the Poe School, 10538 South Langley Avenue, 8:45 a.m.
3. Reporting time at the Poe School in the afternoon is to be 2:00 p.m., with departure time of 2:10 p.m. and estimated time of arrival at Brennan at 2:15 p.m.

"*Service C*: Transportation for pupils from the Bradwell School Attendance Area to four (4) other schools:

1. Nine (9) buses required.
2. Vehicles must be available each school day with a reporting time from Bradwell, 7736 South Burnham Avenue, of 8:30 a.m. and arrival at the destinations of Tanner School, 7350 South Evans Avenue, Brownell School, 6741 South Michigan Avenue, Cornell School, 7540 South Drexel Avenue, and Deneen School, 7240 South Wabash Avenue, shortly thereafter.
3. Reporting time at the receiving schools in the afternoon is to be 2:30 p.m. with departure time of 2:40 p.m. and arrival back at the Bradwell School approximately 3:00 p.m."

Pupil transfers such as these have been used in the past to move groups of students to less crowded schools or to schools offering special facilities or programs. According to the affidavit of David Kruger, Director of Sales for the CTA, this type of school-to-school service is identical to that called for in the Chicago Board of Education's voluntary integration program. Mr. Kruger states

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that school-to-school services were *not* "school bus operations". In other words, the *Bradford* ruling represented a reversal of the earlier position. However, in view of the court's determination that the *Bradford* ruling was not in accordance with the UMTA regulations, this issue need not be reached.

that the CTA has submitted the lowest bid for the voluntary integration program contract.

It is apparently conceded that the CTA's fleet of buses were purchased with 80% funding from the UMTA, and that these buses were used in the school-to-school operations. The Chief Counsel made no finding as to whether the 19 buses used in these operations were also used for normal mass transportation routes. However, the record does suggest that they were.[3] In addition, no finding was made as to whether the school-to-school operations interfered with regularly scheduled mass transportation runs.[4] Instead, the Chief Counsel ruled that these were "school bus operations" and that the relevant statutes and regulations prohibited any use of federally funded equipment for this purpose. This ruling represented a reversal of the UMTA's previous position on school-to-school services. In May, 1977, the Chief Counsel ruled that such services were permissible as "incidental charter operations," in a case entitled *A & D Davenport Transportation, et al.* v. *CTA*.

The Urban Mass Transportation Act provides that the Secretary of Transportation is authorized "on such terms and conditions as he may prescribe," to make grants or loans to assist State and local public entities in financing "the acquisition, construction, reconstruction, and improvement of facilities and equipment *for use*, by operation or lease or otherwise, *in mass transportation* in urban areas." (Emphasis added.) 49 U. S. C. § 1602(a)(1).

The Act defines "mass transportation" as follows:

> "the term 'mass transportation' means transportation by bus, rail, or other conveyance, either publicly or privately

3. In *A & D Davenport*, the Chief Counsel found that the buses used in the school-to-school services were also used in normal mass transportation service. In this case, the Chief Counsel noted that the services in *A & D Davenport* were "identical in character" to the ones here involved. The defendants do not dispute the assumption that the buses were used primarily for mass transportation routes.

4. The parties do dispute this issue, and the case will be remanded for a determination on this issue, *see infra* at 11-12.

owned, which provides to the public general or special service (*but not including school buses* or charter or sightseeing service) on a regular and continuing basis." (Emphasis added.) 49 U. S. C. § 1608(c)(5).

It is clear from these provisions that the Congress intended that the money made available by this Act be used to support existing and expanded public transportation facilities. The drafters might well have been afraid that this purpose would be frustrated by diversion of the money from public transportation to school bus programs or charter and sightseeing facilities.[5]

After enactment of this definition in the Urban Mass Transportation Act of 1964, the question arose whether a grant may be made when the recipient intended to use the federally financed equipment for both mass transportation and charter service uses. An opinion of the Comptroller General in 1966 set forth the rule that UMTA financed equipment could be used for charter service, but only "during idle or off-peak periods when the buses are not needed for regularly scheduled runs." Such use was defined as "incidental", and was found necessary to an efficient mass transportation system:

> "One of the basic facts of urban mass transportation operations is that the need for rolling stock is far greater during the morning and evening rush hours on weekdays than at any other time. For that reason, any system which has sufficient rolling stock to meet the weekday rush-hour

5. By amendment to the Urban Mass Transportation Act in 1974 and by the Federal-Aid Highway Act of 1973, provisions were added which state that every applicant for federal assistance must promise not to engage in "school bus operations". Exceptions are provided for those entities who have already made an investment in the special equipment needed for school bus operations. Thus, an applicant is exempt from this requirement if it has engaged in school bus operations in the past, or if it operates a school system, or if there are no private school bus operators able to provide adequate service, see 49 U. S. C. §§ 1602(g), 1602a(b). However, even if an applicant is permitted to continue its school bus operations, it must keep these operations separate from the mass transportation facilities, and federal funds may not be used in connection with the school bus equipment, see 49 C. F. R. § 605.12.

> needs of its customers must have a substantial amount of equipment standing idle at other times, as well as drivers and other personnel being paid when there is little for them to do. To relieve this inefficient and uneconomical situation, quite a number of cities have offered incidental charter service using this idle equipment and personnel during the hours when the same are not needed for regularly scheduled runs . . .
>
> "Such service contributes to the success of urban mass transportation operations by bringing in additional revenues and providing full employment to drivers and other employees. It may in some cases even reduce the need for Federal capital grant assistance.
>
> "We do not consider that there is any violation of either the letter or the spirit of the Act as a result of such incidental use of buses in charter service." (Quoting from a report of the HUD.)

Thus, federally funded equipment can be used for other purposes, but only during the off-peak hours when the equipment would otherwise be idle.

The Act does not contain a definition of "school bus operations". In addition, it is unclear whether the Comptroller General's opinion regarding "incidental" charter service applies as well to "incidental" transportation of school students. These gaps have been filled in by the Department of Transportation's UMTA regulations, published at 49 C. F. R. §§ 604-605.

Part 605 of the regulations applies only to "school bus operations". This category is limited by the following definition:

> " 'School bus operations' means transportation by bus exclusively for school students, personnel and equipment in Type I and Type II school vehicles as defined in Highway Safety Program Standard No. 17."

Highway Safety Program Standard No. 17 defines Type I vehicles as any motor vehicle "used to carry more than 16 pupils to and from school", and Type II is defined as any motor vehicle "used to carry 16 or less pupils to and from school",

23 C. F. R. § 1204.4. The Standard requires that Type I vehicles be identified as a school bus, either by color or sign, and be equipped with signal lamps and an extensive system of mirrors. Type II vehicles may or may not be required to comply with these specifications, depending on the State's own regulations.

If, under the UMTA regulations, a bus service is not a "school bus operation" then it is treated under Part 604, Charter Bus Operations. Briefly, a charter bus service is permissible if it is performed during off-peak hours and does not interfere with regularly scheduled mass transportation services, see 49 C. F. R. §§ 604.3, 604.11, 604.13. Such permissible "incidental charter services" expressly include the "incidental use of buses for the exclusive transportation of school students, personnel, and equipment". 49 C. F. R. § 604.3; see also, 49 C. F. R. §§ 605.3, 605.12.

Thus, the fundamental issue in this case is whether the services described above are "school bus operations" within the meaning of the UMTA regulations. In essence, if they are school bus operations, then the CTA may not use federally financed equipment in their performance; if they are not, then the CTA may use federally funded equipment if such use is "incidental".

In the *Bradford* ruling, the Chief Counsel disregarded the definition of "school bus operations" contained in the UMTA regulation, explaining that "[t]he Highway Safety Program Standard referred to defines the physical characteristics of bus vehicles, but not the operational characteristics of school bus operations." The Chief Counsel then adopted an alternative definition which would include the type of school-to-school service involved in this case.[6]

6. The Chief Counsel's proposed definition is confusing—she would define school bus operations as "the recurring, everyday use of buses exclusively for school operations." It is unclear whether "exclusively" refers to the use of certain buses solely for school operations, or the occasional use of normal public buses to carry a group composed solely of school pupils and personnel. Although the

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However, the Chief Counsel does not have the authority to so disregard a UMTA regulation, *see Morton* v. *Ruiz,* 415 U. S. 199 (1974); *Oil Shale Corp.* v. *Morton,* 370 F. Supp. 108 (D. Col. 1973). Moreover, the Chief Counsel was simply wrong in saying that the Highway Safety Standard does not use operational aspects in definitions of Type I and Type II vehicles. Both of these categories refer only to vehicles "used to carry . . . pupils to and from school." These are operational definitions; a different part of the Standard imposes the requirements concerning physical characteristics.

In order to interpret the meaning of the UMTA definition, it is necessary to determine whether the phrase, "used to carry . . . pupils to and from school" embraces only home to school transportation or whether it applies as well to the school-to-school services disputed in this case. The purpose of the Highway Safety Program Standard No. 17 is to impose certain special identification and equipment requirements on school buses. These are obviously designed to alleviate the special dangers created by multiple, on-the-road pickups of school children. In contrast, school-to-school transportation would not entail the same dangers, because the students would be loading and disembarking as a group, on or near the school grounds. Thus, the court concludes that the use described in the Highway Safety Program Standard No. 17 does not include the school-to-school transportation.

It is also reasonable for the UMTA to have incorporated this limitation in the definition of "school bus operations" under the Urban Mass Transportation and Federal Aid Highway Acts. As the preceding exposition demonstrates, various provisions of those acts are designed to assure that UMTA money is used

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Chief Counsel made no finding on the question whether the 19 buses involved in Service B and C also were used for normal mass transportation purposes, the CTA represented that they were, and the record does not disclose any dispute on this matter. See footnote 3, *supra.*

primarily for mass transportation equipment and operations. The limited definition makes clear that UMTA money should not be used to finance the special equipment required to operate Type I or Type II buses, while leaving open the possibility that regular buses may be used for the transportation of school students on trips which do not require on-the-street pick-ups.[7]

Moreover, the school-to-school services involved in this case fit within the definition of "charter bus operations" set forth in § 604.3 of the UMTA regulations:

> " 'Charter bus operations' means transportation by bus of a group of persons who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles or service, in accordance with the carrier's tariff, have acquired the exclusive use of a bus to travel together under an itinerary, either agreed on in advance, or modified after having left the place of origin. (This includes the incidental use of buses for the exclusive transportation of school students, personnel and equipment)".

The fact that the school-to-school transportation occurs every school day does not remove it from within this definition. There is no reason to make a distinction between single trip and repetitive service; the reference to a "single contract" in the definition of "charter bus operations" refers to the fact that the entire group is covered by the contract, rather than each passenger arranging his own. There is nothing in the definition which would prevent a single contract for repetitive service.

The regulations provide that a grantee may not use federally funded equipment in charter bus operations, and must agree not to do so, *except* on an incidental basis, as set forth in the Opinion of the Comptroller General as quoted above, see 49 C. F. R.

7. This conclusion conforms with the Chief Counsel's decision in *A & D Davenport,* where he ruled that "school bus operations" encompassed multiple, on-the-street pick-up routes, but not school-to-school services.

§§ 604.11, 604.13. "Incidental" is defined as operations "which do not interfere with regularly scheduled service to the public." Part 605 parallels these provisions:

> "A grantee or operator may, however, use [federally funded] buses, facilities and equipment for the transportation of school students, personnel and equipment in incidental charter bus operations. Such use of project equipment is subject to Part 604 . . ." 49 C. F. R. § 605.12.
>
> " 'Incidental' means the transportation of school students, personnel and equipment in charter bus operations during off peak hours which does not interfere with regularly scheduled service to the public . . ." 49 C. F. R. § 605.3.

In this case, the CTA contends that even though the operations require a morning reporting time of 8:30 a.m., this is not during the morning rush hour in the areas involved, and that if not employed on the school-to-school jobs, the 19 buses would be returned to the garage.[8] The defendants dispute this claim, and contend that the morning service would in fact conflict with regularly scheduled service to the public. Since the Chief Counsel decided that these were "school bus operations", she did not reach the question whether they interfered with regularly scheduled routes or were "incidental". Accordingly, the case will be remanded to the UMTA for findings on this question.

Accordingly, the court finds that the Chief Counsel's ruling in the *Bradford* case, dated April 25, 1978, was beyond the authority of the Chief Counsel and was not in accordance with the applicable law. As the court observed in *Oil Shale Corp.* v. *Morton, supra,* at 123-24:

> "The authority to change Departmental regulations and policies does not relieve a Department head from the obligation of following such regulations and policies *until they are officially and publicly changed.*"

8. The plaintiff contends that this question was resolved in its favor in the *Davenport* ruling, *supra.* However, Service C involves different schools, and there may be new bus routes or other new considerations which would be relevant to the use of buses for Service B.

The ruling is therefore set aside as invalid. The case is remanded to the agency for further proceedings consistent with this memorandum opinion and order.

ENTER:

BERNARD M. DECKER
United States District Judge

Dated: August 23, 1978.

APPENDIX C.

DEPARTMENT OF TRANSPORTATION
Urban Mass Transportation Administration
Washington, D. C. 20590

Apr. 25, 1978

Mr. James Flynn
Lynch & Flynn
One IBM Plaza
Suite 2410
Chicago, Illinois 60611

Mr. Ronald Bartkowicz
Chicago Transit Authority
Room 7-170
Merchandise Mart
Chicago, Illinois 60654

Re: Bradford School Bus
Transit, Inc., et al., v.
Chicago Transit Authority,
Docket No. 77-001.

Dear Messrs. Flynn and Bartkowicz:

This letter will constitute the decision of the Chief Counsel in the above-referenced complaint, by Bradford School Bus Transit ("Bradford") against the Chicago Transit Authority ("CTA"). The complaint was filed pursuant to 49 C. F. R. § 605.30 of the UMTA School Bus Regulations,[1] in April, 1977. Bradford

1. Section 605.30 reads as follows:

§ 605.30 Filing a Complaint.

Any interested party may file a complaint with the Administrator alleging a violation or violations of terms of an agreement entered into pursuant to § 605.14. A complaint must be in

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alleged that CTA contracted with the Board of Education of the City of Chicago ("Board of Education") to provide bus transportation exclusively for school children by taking them from certain pick-up points to their schools of regular attendance and return. Subsequent inquiry by the Office of Chief Counsel revealed that in December, 1974, the Board of Education solicited bids from interested transportation operators to provide school transportation services described as follows:

> "*Service A:* Transportation of Haven School pupils who have been transferred to the Ward School:
>
> 1. One bus to accommodate approximately 40 pupils who are involved in this program.
> 2. Vehicle must be available each school day with a reporting time of 8:30 a.m. to the first pick-up point at 729 South State Street. There are six other points of pick-up. The last of which is Archer and State. Bus arrival time at the Ward School, 2701 South Shields Avenue, is approximately 8:50 a.m.
> 3. Reporting time to the Ward School in the afternoon is to be 2:15 p.m. with the pupils being returned to their respective pick-up points.
>
> *Service B:*
>
> 1. Ten (10) buses are needed to transport 500 pupils involved in this program.
> 2. Vehicles must be available each school day with a reporting time at the Brennan School, 11411 South Eggleston Avenue, to be at 8:20 a.m. Leaving time from Brennan is to be 8:30 p.m. with an estimated time of arrival at the Poe School, 10538 South Langley Avenue, 8:45 a.m.

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writing, must specify in detail the action claimed to violate the agreement, and must be accompanied by evidence sufficient to enable the Administrator to make a preliminary determination as to whether probable cause exists to believe that a violation of the agreement has taken place.

> 3. Reporting time at the Poe School in the afternoon is to be 2:00 p.m., with departure time of 2:10 p.m. and estimated time of arrival at Brennan at 2:15 p.m.
>
> *Service C:* Transportation for pupils from the Bradwell School Attendance Area to four (4) other schools:
>
> 1. Nine (9) buses required.
> 2. Vehicles must be available each school day with a reporting time from Bradwell. 7736 South Burnham Avenue, of 8:30 a.m. and arrival at the destinations of Tanner School, 7350 South Evans Avenue, Brownell School, 6741 South Michigan Avenue, Cornell School, 7540 South Drexel Avenue, and Deneen School, 7240 South Wabash Avenue, shortly thereafter.
> 3. Reporting time at the receiving schools in the afternoon is to be 2:30 p.m. with departure time of 2:40 p.m. and arrival back at the Bradwell School approximately 3:00 p.m."[2]

In an affidavit submitted in support of the complaint, William A. Bradford stated that both Bradford and CTA bid on the services set forth in the solicitation; that Bradford's bid was rejected; that CTA's bid was accepted; and that he was informed and believes that CTA thereafter performed the services so described. Also submitted in support of the complaint is a copy of the Board of Education's Report (dated January 22, 1975), in which the Board approved the CTA bid.

The Initial Determination

As required by section 605.31 of the UMTA regulation,[3] the respondent, CTA, was notified of the complaint and that there was evidence which would support a finding that its agreement

2. Bid solicitation No. D. P. 75-6104, December 11, 1974, page 2.

3. Section 605.31 reads as follows:

§ 605.31 Notification to the respondent.

On receipt of any complaint under § 605.30 or on his own motion if at any time he shall have reason to believe that a

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not to compete with private school bus operators had probably been violated. The letter noted that the Haven-Ward service (Service A), was similar to that which had been found to be violative of the regulation in a previous case, *A&D Davenport Transportation, et al.* v. *Chicago Transit Authority.*[4] The letter further noted that the remaining services, B and C, were similar to those found to have been legitimate charter operations in the earlier decision.

CTA's Response

CTA was requested to respond to the complaint within 30 days. In its letter of July 15, 1977, CTA responded by noting that Service B was in all respects identical to the Brennan-Poe movements found to be legitimate charter operations in *Davenport*. Similarly, Service C was argued to be, except for the schools serviced, identical to the Raster-Dyett movements also found to be legitimate charter operations in *Davenport*. CTA then argued that Bradford's complaint against CTA's undertaking of Service A was rendered moot by reason that CTA had discontinued that service as a consequence of the *Davenport* decision.[5]

Finally, CTA argued that as a matter of statutory interpretation, the dates establishing a grantee's eligibility to engage

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violation may have occurred, the Administrator will provide written notification to the grantee concerned (hereinafter called "the respondent") that a violation has probably occurred. The Administrator will inform the respondent of the conduct which constitutes a probable violation of the agreement.

4. *A&D Davenport Transportation, et al.* v. *Chicago Transit Authority,* decided May 5, 1977.

5. That service was found to be a school bus operation in *Davenport,* at pages 7-8. It was discontinued in May, 1977. CTA also suggested that Bradford was not an "interested party" having the right to challenge CTA's bid on the Haven-Ward Service, by reason that it had not bid on that service itself. The applicable regulation, § 605.31, permits the Administrator, on his own motion to notify a grantee of any probable violation. In any event, the judicial doctrine of standing has no application to this case.

in school bus operations under the "grandfather clause" contained in section 3(g), should, by virtue of that section's later enactment, supersede those of section 164(b).[6]

The A&D Davenport Decision

At the center of this controversy is the decision of the Chief Counsel in *A&D Davenport Transportation, et al.* v. *Chicago Transit Authority,* decided May 5, 1977. In that decision, the Chief Counsel decided a similar complaint involving services identical in character to the ones challenged in this case. In deciding that two of the services (the same, except for the identity of certain of the schools, as Services B and C heretofore described) were properly characterized as incidental charter services, the Chief Counsel held:

> "The evidence supports Respondent CTA's contention that the Raster-Dyett and Brennan-Poe services are properly

6. The dates stated in the two "grandfather clauses" establishing the periods under which UMTA grantees could qualify to provide school bus service are as follows: to qualify under section 164(b), a grantee or its operator must have engaged in school bus service between August 13, 1972, and August 13, 1973; and to qualify under section 3(g) such school bus service must have occurred between November 26, 1973 and November 26, 1974. CTA first claimed the benefit of the section 3(g) exemption in its defense to the *Davenport* complaint on the basis that it undertook school bus service between the Haven and Ward Schools from September 4 to December 20, 1974. That service would have qualified CTA for an exemption under section 3(g), but not under section 164(b). CTA has since provided this office with information establishing that it undertook school bus operations within the qualifying period set forth in section 164(b). See footnote 11 and accompanying text, *infra.* In the *Davenport* decision, the Chief Counsel rejected CTA's contention that the enactment of section 3(g) superseded the qualifying period set forth in section 164(b). For the same reason, we think that the two provisions of law have independent force, and that each is fully effective. The provisions of section 164(b) apply to grantees of buses, while section 3(g) applies to all other grantees. The effect was not an implied repeal of section 164(b), as CTA suggests, but rather a broadening of that protection to private school bus operators from competition by any grantee. A review of the legislative history supports that view. See Joint Explanatory Statement of the Committee of Conference, Conf. R. 93-1288, 93rd Cong. 2d. Sess. (1974).

characterized as incidental charter operations engaged in pursuant to its authority. Each service involves a common contract of carriage; a common pick-up and delivery point for all school students and personnel so transported; that school students and personnel are transported in preformed groups for a common purpose and remain so constituted for the entire length of the trip, and are thereafter returned to their points of origin in the same manner (compare, 49 C. F. R. Part 1054 [definition of charter party used by the Interstate Commerce Commission]). *No such commonly accepted definition exists to describe school bus operations, and in many respects, school bus and charter operations are similar. The salient characteristic of school bus operations appears to be that school bus operations involve multiple pick-up points serving a common school destination, and a reverse of that pattern on return trips.* The evidence further supports Respondent CTA's contention that its assignment of federally-assisted buses in the above-described manner in no way detracts from the use of said buses in regular mass transportation service during the hours of peak usage, in accordance with the routes and schedules heretofore established for those vehicles. Consequently we conclude that CTA's provision of service between Raster and Dyett Schools and between Brennan and Poe Schools constitutes incidental charter service within the meaning of Part 604 of the UMTA regulations." (emphasis supplied).

Bradford disagrees with the rationale of the *A & D Davenport* decision. Bradford argues that *in fact,* Services B and C are not charter operations but rather they are regularly scheduled school bus operations exclusively for school children, within the meaning of the two statutes.

After considering the matter fully we have determined that Bradford's position on this issue is the correct one.

UMTA's implementing regulations define school bus operations as follows:

> "School bus operations" means transportation by bus exclusively for school students, personnel and equipment in Type I and Type II school vehicles as defined in Highway Safety Program Standard No. 17. 49 C. F. R. § 605.3(b).

The Highway Safety Program Standard referred to[7] defines the physical characteristics of school bus vehicles, but not the operational characteristics of school bus operations.

Thus, the regulation is silent on the issue of whether school bus service includes more than the commonly accepted notion of street corner pickups and deliveries to and from school. The regulation omits any reference to whether the recurring, everyday transportation of groups composed exclusively of school children from a *single* pickup point or a small number of pick-up points in the case of Service C, to their school of regular attendance would disqualify an otherwise legitimate incidental charter service.

UMTA previously ruled in CTA's favor because the single pick-up point rather than multiple pick-up points made the CTA operation look more like charter service than school bus operations. However, a close analysis of the statutes and their sparse legislative history indicates that Congress was more concerned with the recurring, everyday use of UMTA funded equipment exclusively for school operations. The original House version of section 164(b) precluded grantees from the "transporting of school children and school personnel *to and from school and school-authorized functions.*"[8] (emphasis added).

7. 23 C. F. R. § 1204.4.

8. S. 502, 93rd Cong. 1st Sess., § 123. The House Amendment would have prohibited financial assistance to "any State or local public body or agency thereof which engages directly or indirectly in the transporting of school children and school personnel to and from school and school-authorized functions in competition with or supplementary to the service currently provided by a private transportation company or other person engaged in so transporting such children and personnel." Also, during debate on the bill, an amendment proposed by Congressman Wright would have amended the UMT Act in the same manner, but in addition, would have prohibited UMTA grantees from expanding "present routes, schedules, service, or facilities for the purpose of providing transportation to school children and school personnel to and from school and school-authorized activities . . ." (119 Cong. Rec. 13266 (April 19, 1973).) Both amendments were eventually rejected by the Conference Com-

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This language would have prevented even a charter trip to the Saturday-night football game, let alone the current CTA operation. At Conference, this language was changed to preclude operations "exclusively for the transportation of students and school personnel," but during floor debate one of the House Conferees stated that the statute was not intended to preclude "*individual* charter-type trips." (119 Cong. Rec. 28102 (Aug. 3, 1973) (Remarks of Congressman Kluczynski)) (emphasis added). The legislative history of section 3(g) tracks the history of section 164(b).[9]

Thus, the legislative history indicates that Congress did not wish to preclude the occasional use of UMTA-funded buses for "individual charter-type trips", but was more concerned with the recurring, everyday use of buses exclusively for school operations.

Consequently, this office will hereafter take the position that the recurring, everyday use of UMTA funded buses exclusively for school operations is prohibited by the two statutes.[10]

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mittee, and in their place, the present language of section 164(b) was substituted. See Conference Report No. 93-410, 93rd Cong. 1st Sess., 87 (1973).

9. The enactment of section 3(g) of the UMT Act has a similar history. Originally, language similar to that set forth above was added to S. 386, the Bill that eventually became the National Mass Transportation Assistance Act of 1974 (Pub. L. 93-503, November 26, 1974, 88 Stat. 1565). That language was rejected by the Conference Committee. Instead, the Conference Committee inserted the present language in section 3(g), which is virtually identical to that contained in section 164(b). In its Joint Explanatory Statement, the Committee stated, "Recipients under the existing capital grant program who have not engaged in school bus operations are not eligible to do so. A similar restriction for recipients of formula grant funds under section 5 is provided". Conf. Rep. 93-1288, 93rd Cong. 2d Sess. (1974). See also 120 Cong. Rec. 33718 (October 3, 1974).

10. As noted in the *A&D Davenport* decision, the UMTA regulations specifically authorize "tripper service" which is regularly scheduled mass transportation service which is open to the public, and which is designed or modified to accommodate the needs of

(Footnote continued on next page.)

We have also considered CTA's claim that its school transportation services to the Montefoire, Mosely, Forrestville, and Motley Schools during the period commencing August 13, 1972 and ending August 13, 1973, brings the Ward-Haven service within the statutory exemption.[11] In general, we think that the legislative history supports the view that any school bus service performed during the qualifying period brings an UMTA grantee within the statutory exception, and we find that CTA did perform such service. However, even though CTA, by virtue of its qualifying service, during the years 1972 and 1973 has a legitimate claim to the exemption, it may not perform school services using UMTA funded equipment.[12] Consequently, if CTA wishes to perform school bus operations, it must do so with equipment purchased and maintained independently of UMTA assistance.[13]

(Footnote continued from preceding page.)
school students and personnel, using various fare collections or subsidy systems. Buses used in tripper service must be clearly marked as open to the public and may not carry designations such as "school bus" or "school special". These buses may stop only at a grantee or operator's regular service stop, and all routes traveled by tripper buses must be within a grantee's or operator's published route schedules. 49 C. F. R. § 605.3(b).

11. The penultimate sentence of section 164(b) reads, in pertinent part, as follows:

> ". . . this subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting school children and personnel along with facilities to be used therefore) was so engaged in school bus operations anytime during the twelve-month period immediately prior to the date of the enactment of this subsection."

12. Section 605.12 of the regulation provides that "No grantee or operator of project equipment shall engage in school bus operations *using buses, facilities, or equipment funded under the Acts.*" (Emphasis supplied.)

13. Although section 605.3(b) refers to the use of Type I and Type II school vehicles specified in Highway Safety Program Standard No. 17 (23 C. F. R. § 1204.4), that standard authorizes the use of standard buses used in regular common carrier transit route

(Footnote continued on next page.)

This decision represents a reversal of this office's previous position. We recognize that CTA has relied on that earlier opinion in continuing to provide services to the Brennan, Poe, Bradwell, Tanner, Brownell, Cornell, and Deneen Schools. Also, the current academic year will be completed within three months of the date of this decision. Therefore, we believe that an immediate cessation of service to the affected schools with UMTA-funded buses would cause hardship and inconvenience to CTA and to the Board of Education without concomitant benefit to the complainants. Consequently, CTA will be permitted to complete its existing contract for this school year, with the proviso that such services may not be performed by CTA in the future.

Sincerely,

/s/ Margaret M. Ayres
Chief Counsel

(Footnote continued from preceding page.)
service provided that those buses are marked as specified (paragraph IV. B. 2). Consequently, UMTA has no objection to CTA's use of transit-type buses to perform school bus service, provided that UMTA assistance plays no part in either the purchase or maintenance of those vehicles. UMTA takes no position as to whether CTA's use of standard transit buses in school bus service conforms to the requirements of Illinois law.

APPENDIX D.

MEMORANDUM IN RE

THE COMPLAINT OF A&D DAVENPORT TRANSPORTATION, TRANSPORTATION BY LAMAR, BRADFORD SCHOOL BUS TRANSIT, INC., AND N. H. L. TRANSPORTATION AGAINST THE CHICAGO TRANSIT AUTHORITY.

FINDINGS OF FACT, AND CONCLUSIONS OF LAW

A. *Introduction*

On December 1, 1976, a Complaint was received on behalf of A&D Davenport Transportation, Transportation by Lamar, Bradford School Bus Transit, Inc., and N. H. L. Transportation (hereinafter, "the Petitioners") against the Chicago Transit Authority (hereinafter, sometimes "CTA" or "the Respondent") and the Board of Education of the City of Chicago.[1] The Complaint alleged that the Respondent has applied for and received large sums of money pursuant to applications by it; that Respondent had entered into a grant contract with the Urban Mass Transportation Administration (hereinafter "UMTA"); that said grant contract incorporated an agreement that the Respondent would comply with the terms of section 164(b) of the Federal-Aid Highway Act of 1973 (P. L. 93-87, August 13, 1973, 88 Stat. 250, § 164(b));[2] that subsequent to its entering into the

1. The Urban Mass Transportation lacks jurisdiction to decide any claim made against the non-transit entity. Hence no consideration will be given to any claim against the Board of Education of the City of Chicago.

2. Section 164(b) [49 U. S. C. § 1602a] reads, in pertinent part, as follows:

"(b) No Federal financial assistance shall be provided . . . for the purchase of buses to any applicant for such assistance un-

(Footnote continued on next page.)

grant contract, Respondent bid on certain contracts with the Board of Education of the City of Chicago, specifically Bid Numbers D. P. 77-6116 (transporting school children between Raster and Dyett Schools) and 77-6117 (transporting school children between Brennan and Poe Schools, and to and from certain points in the City of Chicago and Ward School); that Petitioner's also bid on those solicitations, and that Respondent CTA was awarded, and accepted, contracts to provide said service in violation of its agreement to comply with section 164(b) of the 1973 Federal-Aid Highway Act.

In support of its complaint, Petitioner's attorney, Thomas N. Todd, Esq., furnished UMTA with an affidavit from Jerry Hargrove, Sr., one of the owners of petitioner N. H. L. Transportation, attesting to certain CTA buses being used to transport school children from the Raster School to points elsewhere in the City of Chicago. Mr. Hargrove further stated that he had personally observed CTA transit buses used to transport school children on other occasions.

On December 2 and 6, 1976, a preliminary investigation was conducted via telephone with CTA. Subsequently, on December

(Footnote continued from preceding page.)

less such applicant and the Secretary of Transportation shall have first entered into an agreement that such applicant will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators. . . . This subsection shall not apply unless private school bus operators are available to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards, and this subsection shall not apply with respect to any State or local public body or agency thereof if it, (or a direct predecessor in interest from which it acquired the function of so transporting school children and personnel along with facilities to be used therefor), *was so engaged in school bus operations any time during the twelve-month period immediately prior to the date of the enactment of this subsection.* . . ." The effective date of section 164(b) was August 13, 1973.

An identical provision is incorporated in section 3(g) of the Urban Mass Transportation Act of 1964, as amended, (49 U. S. C. § 1601, 1602(g)), whose effective date was November 26, 1974.

16, 1976, a letter was sent to CTA reciting certain statements made during those telephone conversations, to the effect that service provided pursuant to Solicitation No. 77-6116, between the Raster and Dyett Schools and service provided under Solicitation No. 77-6117, between the Brennan and Poe Schools, was claimed as an incidental charter operation undertaken pursuant to the UMTA Charter Regulations (49 CFR Part 604; 41 Fed. Reg. 14122 [April 1, 1976]). CTA was requested to submit documentation substantiating its charter claims. The service to Ward School undertaken pursuant to Solicitation No. 77-6117 was noted as a probable violation of the UMTA school bus regulations (49 CFR Part 605; 41 Fed. Reg. 14127 [April 1, 1976]). A response was requested within 20 days thereafter.

Subsequently, CTA submitted copies of route maps and schedules in support of its contentions that it is lawfully engaged in incidental charter service and to rebut the finding by the Chief Counsel that CTA had engaged in a probable violation of the UMTA school bus regulations.

B. *Findings and Conclusions*

The Urban Mass Transportation Administration has considered the statements made by the Petitioners and the Respondent, and we have concluded that the petitioners have failed to show violation of the UMTA school bus regulations with regard to service to Raster and Dyett Schools and Brennan and Poe Schools, but that a violation has been shown regarding service to Ward School.

Specifically, the evidence submitted by Respondent CTA shows that the services to the Raster-Dyett Schools (Contract No. 77-6116) consists of morning and afternoon movements; that the morning segment utilizes 10 buses for group transportation of students from Raster School to Dyett School; that each of the 10 buses reports to Raster at 8:30 a.m. and is scheduled to complete its movement by 8:45 a.m.; that after discharging a group, each bus returns to its respective garage; that each of

the buses utilized for the movement had completed its morning schedule, and but for the group movement would have returned to its respective garage; that the afternoon segment reverses the morning group movement; that students are picked up at Dyett School at 3:20 p.m. and are returned to Raster School not later than 3:45 p.m., at which point each bus then commences its normal scheduled route service. The evidence further shows that the morning movement utilizes buses from CTA's 77th, 69th and Archer Garages, that the afternoon movement utilizes buses from the 52nd and Archer Garages; and that each of said garages services routes which are in close proximity to Raster and Dyett Schools.

With respect to service to the Brennan and Poe Schools (Contract No. 77-6117) the evidence shows that this service also involves morning and afternoon movements, utilizing 9 buses; that the morning movement transports students in preformed groups from Brennan to Poe School commencing at 8:20 a.m. and is scheduled for completion not later than 8:45 a.m.; that said movement occurs after the completion of the buses scheduled service and at a time when said buses would ordinarily be returned to their respective garages; that the afternoon segment commences at 2:00 p.m. and are scheduled for completion not later than 2:25 p.m., at which point each bus commences its normal scheduled route service. The evidence further shows that buses for the Brennan-Poe service come from the CTA Beverly Garage which provides buses for routes that are in close proximity to Brennan and Poe Schools.

The evidence supports Respondent CTA's contention that the Raster-Dyett and Brennan-Poe services are properly characterized as incidental charter operations engaged in pursuant to its authority. Each service involves a common contract of carriage; a common pick-up and delivery point for all school students and personnel so transported; that school students and personnel are transported in pre-formed groups for a common purpose and remain so constituted for the entire length of the trip, and are

thereafter returned to their points of origin in the same manner (compare, 49 CFR Part 1054 [definition of charter party used by the Interstate Commerce Commission]). No such commonly accepted definition exists to describe school bus operations, and in many respects, school bus and charter operations are similar. The salient characteristic of school bus operations appears to be that school bus operations involve multiple pick-up points serving a common school destination, and a reverse of that pattern on return trips. The evidence further supports Respondent CTA's contention that its assignment of federally-assisted buses in the above-described manner in no way detracts from the use of said buses in regular mass transportation service during the hours of peak usage, in accordance with the routes and schedules heretofore established for those vehicles. Consequently we conclude that CTA's provision of service between Raster and Dyett Schools and between Brennan and Poe Schools constitutes incidental charter service within the meaning of Part 604 of the UMTA regulations.

We cannot agree, however, that the service to Ward School constitutes charter, rather than school bus, service, even though some of the requisite characteristics of ordinary charter operations are present. The evidence shows that the service to Ward School utilizes one bus for the morning and afternoon segments; that the morning segment commences at 8:30 a.m. and is scheduled for completion at 8:50 a.m.; that the afternoon segment commences at 2:30 p.m. and is scheduled for completion at 2:50 p.m. The difference between the Ward School service and the other two services described above is that school students are picked up at regular route bus stops on the trip to Ward School, and are discharged at those stops on the return trip, which is indistinguishable from school bus service.[3]

3. This type of service must be distinguished from so-called "tripper service" which the regulations define as "regularly scheduled mass transportation service which is open to the public, and which is designed or modified to accommodate the needs of school students

(Footnote continued on next page.)

Consequently, we conclude that the Ward School service constitutes a school bus operation within the meaning of the applicable statute and regulations thereunder.

Respondent has also raised an affirmative defense that it is exempt from the prohibitions contained in section 3(g) of the Urban Mass Transportation Act of 1964 (49 U. S. C. § 1602(g)) in that the subject contract was effective within the 12 months preceding November 26, 1974, the date of enactment of section 3(g). However, this defense does not address the requirements of section 164(b) of the Federal-Aid Highway Act of 1973 (49 U. S. C. § 1602a) which prohibits UMTA grantees from engaging in school bus operations unless, inter alia, they, or a direct predecessor in interest was engaged in school bus operations "at any time during the 12-month period immediately prior to the date of enactment of this section." The effective date of section 164(b) was August 13, 1973. Although this statute was never codified, neither was it amended or repealed upon the subsequent enactment of section 3(g), and therefore, the one year period specified in that statute is still effective to bar Respondent's competition the petitioners with respect to the Ward School service.[4]

(Footnote continued from preceding page.)

and personnel, using various fare collections or subsidy systems." The regulation further requires that buses used in tripper service must be clearly marked as open to the public and may not carry designations such as "school bus" or "school special". These buses may stop only at a grantee or operators regular service stop, and all routes traveled by tripper buses must be within a grantee's or operator's regular route service as indicated in their published route schedules 49 CFR § 605.3(b). In the instant case, the CTA vehicles engaged in the carriage of the school students were operating during times either before or after their regularly scheduled route service, and away from their regular routes.

4. The exemptions to the regulations apply only to "a state or local public body or agency thereof (or a direct predecessor in interest which has acquired the function of so transporting school children and personnel along with facilities to be used therefor) *who was so engaged in school bus operations*

(Footnote continued on next page.)

C. *Decision*

It is therefore our decision that Respondent CTA should cease and desist from further competition with private school bus operators in the manner so described herein.

/s/ JAMES M. CHRISTIAN
James M. Christian
Chief Counsel

(Footnote continued from preceding page.)

"(1) *In the case of a grant involving the purchase of buses any time during the 12 month period immediately prior to August 13, 1973.*"

"(2) In the case of a grant for construction or operating of facilities and equipment made pursuant to the Urban Mass Transportation Act of 1964, as amended, anytime during the 12 month period immediately prior to November 26, 1974."

49 CFR § 605.11(c).

Supreme Court, U. S.
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No. 79-1303

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHICAGO TRANSIT AUTHORITY, PETITIONER

v.

NEIL E. GOLDSCHMIDT, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 607 F. 2d 1284. The opinion of the district court (Pet. App. A22-A32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1979. A petition for rehearing was denied on January 10, 1980. The petition for a writ of certiorari was filed on February 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Urban Mass Transportation Administration correctly determined that the daily transpor-

tation of school children from school to school constitutes "school bus operations" within the meaning of the Urban Mass Transportation Act of 1964, 49 U.S.C. 1602(g) and 1602a(b).

2. Whether the Urban Mass Transportation Administration correctly determined that petitioner could not conduct school bus operations under the "grandfather clause" in 49 U.S.C. 1602(g) and in 49 U.S.C. 1602a(b), while using federally-subsidized buses.

STATEMENT

1. The Urban Mass Transportation Act of 1964, 49 U.S.C. 1601 *et seq.* (the Act), authorizes the Secretary of Transportation to make grants or loans to assist states and local public bodies in the acquisition or construction of facilities and equipment for use in "mass transportation." 49 U.S.C. 1602(a)(1). The term "mass transportation" is defined in 49 U.S.C. 1608(c)(5) as "transportation by bus, rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (*but not including school buses* or charter or sightseeing service) on a regular and continuing basis" (emphasis added).

49 U.S.C. 1602(g) precludes the Secretary from disbursing any monies under the Act unless the applicant for such funds agrees that it "will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators." A similar provision is found in 49 U.S.C. 1602a(b).[1]

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[1]Although now codified in 49 U.S.C. 1602a(b) as part of the Act, this provision was originally enacted as Section 164(b) of the Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 281-282.

Under regulations promulgated by the Urban Mass Transportation Administration (UMTA), the term "school bus operations" is defined as "transportation by bus exclusively for school students, personnel and equipment in Type I and Type II school vehicles as defined in Highway Safety Program Standard No. 17." 49 C.F.R. 605.3(b). The referenced Safety Standard No. 17 of the National Highway Transportation Safety Administration (NHTSA) refers to school vehicles, with certain exceptions not here relevant, as motor vehicles "used to carry more than 16 pupils to and from school" (Type I) and motor vehicles "used to carry 16 or less pupils to or from school" (Type II). 23 C.F.R. 1204.4-III.

Grant applicants under the Act must agree not to engage in school bus operations. 49 C.F.R. 605.15. If the grantee desires to undertake activities that it believes fall within exemptions from such prohibitions (49 C.F.R. 605.11), it must notify "all private school bus operators operating in the urban area" (49 C.F.R. 605.16). The UMTA may then approve these activities after review of any comments received by the private bus companies (49 C.F.R. 605.18-605.19). Additionally, an "interested party" may file a complaint with the UMTA alleging a violation of the grantee's agreement not to engage in school bus operations. If the UMTA finds that a violation has occurred, it may order appropriate remedial measures, including the possible withdrawal of further financial assistance (49 C.F.R. 605.30-605.34). The final determination of the UMTA is subject to judicial review (49 C.F.R. 605.35).

2. In December 1974, the Chicago Board of Education solicited bids for the transportation of school pupils from one school to another in the morning and their return at

the end of the school day.[2] Petitioner successfully underbid all private competitors with its fleet of buses purchased with an 80% subsidy under the Act (Pet. App. A3). In April 1977, Bradford School Transit, Inc., a private school bus operator and an unsuccessful bidder for the Chicago Board of Education contract, filed an administrative complaint with the UMTA alleging that petitioner's performance of the school board contract violated its grant agreement not to engage in school bus operations (*id.* at A4-A5).

On April 25, 1978, the UMTA ruled that the services provided under the Chicago Board of Education contract were school bus operations prohibited under the Act (Pet. App. A33-A42). The UMTA reviewed the statute and its legislative history, which showed that Congress intended to permit "'individual charter-type trips'" as incidental charter service, but not "the recurring, everyday use of buses exclusively for school operations" (*id.* at A40).[3] The UMTA ruled that some of the disputed operations could be continued in the future pursuant to the "grandfather clause" in 49 U.S.C. 1602a(b), because petitioner had engaged in such operations in 1972-1973, but that the operations could not be carried out using equipment funded by the Act (Pet. App. A41). Petitioner was permitted, however, to complete its current contract using such equipment in order to avoid undue hardship (*id.* at A42).

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[2]The services involved are set forth in the opinion of the district court at Pet. App. A24.

[3]The UMTA acknowledged (Pet. App. A42) that it was overruling a previous decision concerning petitioner's operations (*A&D Davenport Transportation, et al.* v. *Chicago Transit Authority* (May 5, 1977) (Pet. App. A43-A49)). In that decision, the UMTA had concluded that school-to-school service was distinguishable from the more familiar home-to-school service for purposes of the prohibition against school bus operations.

Petitioner sought review of the UMTA's decision in the United States District Court for the Northern District of Illinois. That court, concluding that the agency had misconstrued its own regulations, set aside the decision and remanded for a finding whether another provision in the regulations not considered by the agency might preclude petitioner's use of UMTA-funded equipment for the disputed operations (Pet. App. A22-A32).

The court of appeals reversed (Pet. App. A1-A21). The court found that the UMTA properly barred petitioner from using federally-funded equipment for the regular transportation of students from school to school because such transportation constitutes "school bus operations" within the meaning of 49 U.S.C. 1602a(b) and 1602(g) and the applicable agency regulations. In particular, the court construed the phrase "to and from school," as used in Safety Standard 17 and incorporated by reference in the agency regulation defining school bus operations (49 C.F.R. 605.3(b)), to include school-to-school services like those offered by petitioner (Pet. App. A9-A10). The court found this construction more consistent with the purpose for which the Safety Standard was written (*id.* at A9-A13).

The court also rejected petitioner's argument that the disputed services were permissible under agency regulations exempting "charter bus operations." The court observed that petitioner's bus services are regularly scheduled and that to permit them to proceed as charter operations would be contrary to the intent of Congress to minimize competition between grantees and private school bus operators (Pet. App. A13-A16). Finally, the court sustained the UMTA's interpretation of the Act's grandfather clause—an interpretation embodied in agency regulations—as permitting grantees such as petitioner to continue historic school bus operations only where federally-subsidized buses are not used (*id.* at A16-A21).

ARGUMENT

The decision of the court of appeals involves limited questions concerning the interpretation of two similar statutory provisions and implementing regulations.[4] The decision is correct, does not conflict with any decisions of this Court or of another court of appeals, and does not warrant further review.

1. The UMTA's construction of the Urban Mass Transportation Act and of its own implementing regulations is entitled to deference where, as here, that construction is reasonably related to the statutory purpose. See, *e.g.*, *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). The court of appeals correctly concluded that the UMTA had properly read its own regulations as barring petitioner from using federally-subsidized buses in school-to-school transportation and that such a result is consistent with the language and legislative history of the Act.

As petitioner demonstrates (Pet. 11-13), it is possible, under a literal reading of certain provisions referring to incidental charter bus operations, to construe the regulations as permitting a grantee to provide regular school-to-school transportation for students. But, as the court of appeals correctly observed, the UMTA's contrary reading of the regulations defining "charter bus

[4]Petitioner offers no support for its assertion (Pet. 10) that the decision of the court of appeals will result in a loss to public transit authorities of "hundreds of millions of dollars" and will jeopardize school desegregation programs.

operations" and "school bus operations" is at least equally plausible (Pet. App. A14-A15; footnotes omitted):

> Since the transportation here is daily service to and from school at the beginning and end of the school day, it is indistinguishable from undisputed school bus operations except for the common point of pick-up and delivery. Although that distinction permits the services to fit technically within the "charter bus operation" language, we believe that the language of the charter regulation describes a single trip or series of trips for school students rather than daily transportation at the beginning and end of each school day when it speaks of groups traveling under a "single contract" and "under an itinerary, either agreed on in advance or modified after having left the place of origin." The school bus operations regulation, on the other hand, speaks of transportation "to and from school," language which we have concluded describes the daily transportation of students to and from their schools of regular attendance at the beginning and end of the school day. Therefore these services better fit the ordinary meaning of the language of the school bus operations regulation.

Moreover, as the court of appeals noted (Pet. App. A10-A12, A15-A16), this construction of the UMTA's regulations is more consistent with (1) the apparent purpose of Safety Standard No. 17, the language of which is incorporated by reference in the definition of "school bus operations" in 49 C.F.R. 605.3(b), and (2) the intent of Congress in enacting 49 U.S.C. 1602(g) and 1602a(b). First, were petitioner's operations considered outside the definition of "school bus operations" in 49 C.F.R. 605.3(b), they might well escape appropriate safety requirements promulgated by the National Highway Traffic Safety Administration for the safe transportation

of schoolchildren (see Pet. App. A10-A12).[5] Second, petitioner's construction of the regulations is inconsistent with the intent of Congress to place strict limitations on competition between grant recipients and unsubsidized private school bus operators. Although, as petitioner points out (Pet. 13), one proposed limitation—prohibiting grantees from transporting students to "school-authorized functions" (see 119 Cong. Rec. 13266 (1973))—was rejected by Congress when it enacted the provision now codified at 49 U.S.C. 1602a(b), the language finally agreed upon was designed only to permit subsidized buses to "be used on individual charter-type trips to transport schoolchildren to various points of interest * * *." 119 Cong. Rec. 28102 (1973) (remarks of Rep. Kluczynski). The services at issue here obviously do not fall into that category.[6]

2. Petitioner alternatively challenges (Pet. 13-16) the UMTA's regulations that permit petitioner's "grandfathered" school bus operations to continue only with equipment not funded by the UMTA. This contention,

[5]Perhaps in recognition of this result, petitioner appears to have abandoned any reliance on the district court's conclusion (Pet. App. A29) that the UMTA's reading of 49 C.F.R. 605.3(b) is inconsistent with the purpose for which Safety Standard No. 17 was promulgated.

[6]The UMTA's decision cannot be faulted for having overruled a single earlier decision that interpreted the regulations differently (see page 4, note 3, *supra*). An agency "is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 351 (1978).

however, ignores the plain language of the grandfather clauses of 49 U.S.C. 1602(g) and 49 U.S.C. 1602a(b), which provide that the bar to a grantee's engaging in school bus operations in competition with private school bus operators

> shall not apply with respect to any *State or local public body or agency thereof* if it (or a direct predecessor in interest from which it acquired the function of so transporting school children and personnel along with facilities to be used therefor) was so engaged in school bus operations any time during the twelve-month period immediately prior to [the date of the enactment of the subsection]. [Emphasis supplied.]

The language plainly exempts only the grantee agency meeting this criterion; it does not sanction use of the grantee's federally-subsidized equipment.

Petitioner also attacks (Pet. 14-15) the dictum in the court of appeals' opinion that "[f]ederally-funded buses would be exempted only where they have been acquired from a direct predecessor in interest who engaged in school bus operations during the grandfather period" (Pet. App. A18). As petitioner notes (Pet. 14), this would produce the result that an agency acquiring federally-funded buses from a grantee that had engaged in school bus operations during the grandfather period would be permitted to use the equipment in such operations in competition with private bus companies even though a grantee that itself met the grandfather requirement would not be permitted to engage in such operations using its own federally-subsidized equipment. The court's view on this issue, however, is not essential to the basic proposition that the grandfather clause does not permit grantees such as petitioner to use federally-funded equipment in school bus operations in competition with

private school bus companies. Moreover, it does not reflect the policy of the UMTA, whose regulations nowhere suggest such an exemption for federally-subsidized equipment. The parenthetical phrase in the grandfather clause containing the reference to "facilities" merely allows a grantee agency that acquires transportation equipment and facilities from an entity that has engaged in school bus operations during the grandfather period to continue such operations, so long as it does not use federally-subsidized buses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

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Attorneys

APRIL 1980

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